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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

McKENNA (H.M. INSPECTOR OF TAXES) *v.* EATON-TURNER.

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July 3, 4, 5.

Revenue—Income Tax—Person residing in the United Kingdom—Earnings from employment abroad—Main part of remuneration paid in England—" Annual profits or gains . . . . from any . . . . employment . . . . carried on in the United Kingdom or elsewhere "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 1, *Sch. D, para.* 1 (*a*) (*ii.*), *Case II., Sch. E, Rules applicable to Sch. E, r.* 6—*Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18.

A person resident in the United Kingdom who is employed by an English company on work carried on entirely abroad but is paid the main part of his earnings in England, is assessable to income tax in respect of his earnings under Sch. E to the Income Tax Act, 1918, because having regard to the clear words of Sch. D, para. 1 (*a*) (ii.), his case falls within Case II. of Sch. D, which was transferred to Sch. E by the Finance Act, 1922, s. 18.

The fact that r. 6 of the rules applicable to Sch. E provides that " the tax shall be paid in respect of all the public offices

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and employments of profit within the United Kingdom . . . ." does not exclude from taxation under Sch. E a case of the kind transferred to it by the Act of 1922.

Colquhoun v. *Brooks* (1889) 14 App. Cas. 493 explained and distinguished.

Decision of Singleton J. [1935] 1 K. B. 466 affirmed.

Appeal from a decision of Singleton J. (1) on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

Mr. G. W. Eaton-Turner (who was the appellant on this appeal and is hereafter referred to as "the appellant") appealed against assessments which had been made on him to income tax for the years from 1926–7 to 1933–4 under Sch. E.

It was admitted that the appellant, for all the years in question except the first year, was resident in the United Kingdom, having a wife and children living here, and a house from and after June 11, 1926. It was disputed whether he was a resident for the year 1926–7, but the Special Commissioners held that he was.

During the years in question the appellant was employed first as assistant manager and afterwards as manager by the Ashanti Goldfields Corporation, Ld., an English company which carried on a goldmining business in West Africa. The agreements under which the appellant was employed provided, with two minor exceptions, that the whole of the appellant's duties were to be performed on the company's property in West Africa. The exceptions were the agreements of September 2, 1932, and July 5, 1933, which provided that the appellant should attend at the company's offices, when in London. These agreements also provided for the payment of a small portion of the appellant's remuneration in West Africa. The main portion of his remuneration was paid into his bank in London. The Special Commissioners, after hearing the evidence, were satisfied that before the agreement of September 2, 1932, no part of the appellant's work or duties fell to be or was performed in the United Kingdom.

On behalf of the appellant it was contended (i.) that he was not chargeable under Sch. E in respect of any part of

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the moneys paid to him under the agreements; (ii.) that all his duties were performed on the company's property abroad, and that his office was not an office or employment of profit within the United Kingdom for any of the years of assessment; (iii.) alternatively, that this was the position down to September 7, 1932, on which date the appellant first held a separate office involving the performance of duties in the United Kingdom; (iv.) that it was irrelevant that the appellant was a person residing in the United Kingdom for any of the years of assessment or that part of his remuneration was paid to his account here.

On behalf of the inspector of taxes it was contended that the appellant's employment came within the charge of Sch. D, para. 1 (*a*) (ii.), Case II. (as transferred to Sch. E by s. 18 of the Finance Act, 1922), as the main part of his remuneration was payable and was paid in the United Kingdom. As regards the agreement of September 2, 1932, and the subsequent agreement of July 5, 1933, it was contended that the appellant had an employment part of which fell to be performed in the United Kingdom, and that the division purported to be effected by the agreement of July 5, 1933, was unreal.

The Commissioners who heard the appeal held that the appellant did not fall within the charge of Case II. of Sch. D (as transferred to Sch. E) before September 7, 1932, and they discharged the assessments so far as they related to earnings for periods before that date.

On appeal Singleton J. held that the appellant's case was covered by the words of Sch. D, para. 1 (*a*) (ii.), of the Income Tax Act, 1918, and that the result of the Finance Act, 1922, s. 18, was to transfer such a case to Sch. E. He held therefore that he was assessable to income tax for all the years in question.

The appellant appealed in regard to the years before September 7, 1932.

R. W. Needham K.C. and *Cyril King* for the appellant.

Sir Donald Somervell S.-G. and *R. P. Hills* for the respondent.

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The following authorities were referred to in the course of the argument: *Pickles* v. *Foster* (1); *Proctor* v. *Ryall* (2); *Thomson* v. *Bensted* (3); *Colquhoun* v. *Brooks* (4); *Foulsham* v. *Pickles* (5); *San Paulo (Brazilian) Ry. Co.* v. *Carter.* (6)

Lord Hanworth M.R. This is an appeal from a judgment of Singleton J. (7), and the question is whether or not the appellant Mr. McKenna is liable to taxation in accordance with certain assessments which have been made upon him.

The appellant was assessed for 1926–27 and the subsequent years down to the year 1933–34 at a sum of 2500*l.* That represents his salary and commission paid to him in respect of services rendered to a company called the Ashanti Goldfields Corporation, Ld. That company was incorporated under the Companies Acts on May 25, 1897, and carries on a goldmining business in West Africa. Its registered office is situate in London, but the active part of the appellant's services to the company is carried out in West Africa. The appellant was absent from England and engaged in the activities of his work in West Africa during a very considerable part of the year, but it was admitted that he was resident in the United Kingdom, where he had a wife and children and a house. There was some dispute whether in respect of one year he was so resident, but upon the facts before them, the Commissioners held that he was resident in the United Kingdom. The result is that he is to be treated as resident in the United Kingdom during all these years of assessment. Although his actual activities in his capacity of assistant manager and manager were performed abroad, he was paid over here. The Case finds: "We were satisfied that before the agreement of September 2, 1932, no part of the respondent's work or duties fell to be performed or were performed in the United Kingdom." But the Case shows that he was in the main paid by remittance to England either through the Westminster Bank, or through the Bank of New Zealand. Lord Cave, when he was dealing with a case which is by no means dissimilar in *Foulsham* v. *Pickles* (1), said: "In other words, while the burdens incidental to his employment were to be borne wholly or mainly abroad, the principal benefit which he was to derive from it could only be claimed in the United Kingdom."

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(1) [1913] 1 K. B. 174; (1912) 6 Tax Cas. 131.

(2) (1928) 14 Tax Cas. 204, 215.

(3) (1918) 7 Tax Cas. 137.

(4) 14 App. Cas. 493.

(5) [1925] A. C. 458; 9 Tax Cas. 261.

(6) [1896] A. C. 31; (1895) 3 Tax Cas. 407, 411.

(7) [1935] 1 K. B. 466.

It is now contended on behalf of the appellant that he is not liable to be assessed at all in respect of any portion of these sums. The grounds of that argument are that he is not chargeable under Sch. E, for reasons with which I will deal later, and, primarily: "That the whole of his duties under these agreements were in fact performed on the company's property abroad and that the office of the respondent was not an office or employment of profit within the United Kingdom for any of the years of assessment." The real basis for that argument depends upon the decision of the House of Lords in *Colquhoun* v. *Brooks*. (2) It is very important to remember that *Colquhoun* v. *Brooks* (2) was decided under what I may call comprehensively the old income tax law before it had been embodied, and to a large extent consolidated, in the Income Tax Act, 1918. In that case Mr. Brooks, who resided wholly in England and was a partner in a business in this country, was also a partner in a firm carrying on business solely in Melbourne, Australia. Large profits were made by the firm and a portion of his share of the profits was remitted to him in England. That portion was duly returned by him for assessment under Sch. D, but the larger portion of his share of profits in the firm was left in Australia and never at any time formed part of his income in this country. The two businesses—that is the business carried on in England and the business carried on in Melbourne, Australia—were entirely distinct. Mr. Brooks returned as assessable a sum of 3000*l.*, which represented the entire sum remitted to him from his Australian firm during the financial year in question. But there was standing to his credit in books of the Australian firm at Melbourne a sum of 9219*l.*, which was a profit realized and capable of being remitted ; that is to say, it was an ascertained profit. No portion of this 9219*l.* had been received in England ; it remained entirely in the hands of the firm in which he was a partner. The surveyor of taxes contended that Mr. Brooks ought to be assessed not only on the sum of 3000*l.* remitted from Australia but also on the sum of 9219*l.* which lay in the hands of his Australian firm in Melbourne. That assessment having been made upon him the Commissioners on an appeal formed the opinion that the assessment ought to be confined to such sums as were from time to time received by the respondent in Great Britain ; and they allowed his appeal against the assessment and reduced its amount by deducting from the amount of the assessment the sum of 9219*l.*, which was the amount in controversy.

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(1) [1925] A. C. 458, 463. (2) 14 App. Cas. 493.

When the matter came before the Divisional Court, as the revenue cases did in those days, there was a difference of opinion. Stephen J. held that the wide words of Sch. D embraced an item like this 9219*l.*, and therefore that the subject was liable to tax in respect of it. Wills J. differed. It is interesting to see why Stephen J. held that there was a liability, and it is simply and broadly because Sch. D of the Income Tax Act, 1842, imposed the tax in respect of the " annual profits and gains arising or accruing to any person residing in Great Britain, from any . . . . trade . . . . whether the same shall be . . . . carried on in Great Britain or elsewhere." Those wide words are now in Sch. D to the Income Tax Act, 1918, where it is provided as follows in Sch. D, para. 1 : " Tax under this Schedule shall be charged in respect of—(*a*) The annual profits or gains arising or accruing—. . . . (ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere ; ". Stephen J. was of the opinion that those wide words were wide enough to embrace this sum of 9219*l.* lying at the disposal of the subject at Melbourne. Wills J. took a different view, but, following the practice of those days, and in accordance with the old practice of the Court of Exchequer, Wills J. withdrew his judgment and judgment was given for the Crown. Mr. Brooks appealed and the Court of Appeal held that Mr. Brooks was not liable. They held that although those very wide words would embrace this contested item, yet the words were not to be taken in the full significance of their terms. Fry L.J. dissented. The House of Lords affirmed the judgment of the Court of Appeal, holding that Mr. Brooks was not liable, but stating that their reasons differed somewhat from those of the Court of Appeal. It is not quite easy to understand what the divergence was.

I turn to *Colquhoun* v. *Brooks* (1) as reported when it was before the House of Lords. It must be remembered that there was in the Act of 1842 a number of what are called Cases, just as there is in the Act of 1918. The first Case related to the duties to be charged in respect of a trade, manufacture or concern. The second Case related to duty to be charged in respect of professions, employments or vocations. The fourth Case related to income arising from securities out of the United Kingdom, and the fifth Case related to income from possessions out of the United Kingdom. The argument that was presented was that the terms of the statute of 1842 having declared that the tax imposed by Sch. D was to be charged under six Cases, one or other of those Cases must fit the tax if it was to be under Sch. D. Two Cases were relied upon in *Colquhoun* v. *Brooks.* (1) The Court was there dealing with a trader carrying on business, and so the first Case relied on was Case I.: Tax in respect of any trade. But Case V. dealt with income arising from possessions out of the United Kingdom, and it was said: "It is all very well to suppose that Case I. applies, because that covers a trade whether it be carried on in the United Kingdom or elsewhere; there is another Case which is more appropriate to the facts and, if so, the division which is indicated in these Cases ought to be adhered to and the Case be applied which is most appropriate to the facts." And it is pointed out by Lord

(1) 14 App. Cas. 493.

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Herschell (1) that Case IV. deals with income which arises from securities out of the United Kingdom but only makes chargeable such sum as has been received in the United Kingdom. Equally Case V. deals with income arising from possessions outside the United Kingdom, but the tax falls only on so much of the income as is received in this country, whereas, if the income were dealt with under Case I., the whole is subject to taxation, although no part of it ever reaches this country.

Is it possible to assume that that was the intention of the Act? The argument was put in this way by Lord Herschell (2): "It is said that although elaborate machinery is provided for carrying out the taxing purposes of the Act, none of it is applicable to the assessment of the profits of a trade carried on entirely outside the United Kingdom and no part of which is received here. If this be correct it certainly goes far to show that the legislature cannot have intended to tax such profits." He then goes into the discussion germane to that problem. Lord Macnaghten says (3): "The question after all really lies in a narrow compass. Does the case fall within the 'first case' of Sch. D in the Income Tax Act of 1842, and under the head of 'Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act'; or does it fall within the 'fifth case' under the head of 'The duty to be charged in respect of possessions in Ireland, or in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign possessions'? Or, to put the question more shortly still, what is the meaning of the term 'possessions' in the 'fifth case' of Sch. D and in other places in the Act where it is used?" And Lord Macnaghten says further (4): "The income of the respondent from his business in Melbourne, whether he is to be charged in accordance with the contention of the Attorney-General or not, undoubtedly comes under Sch. D. Undoubtedly, the portion of Sch. D which is contained in s. 1 of the Act of 1842 is expressed in the most comprehensive terms possible; and, if not restrained or limited by what follows, would operate to charge the respondent in respect of the whole of his Melbourne income. I do not, however, agree with the argument urged at the Bar, that the rest of Sch. D, which is found in s. 100, is mere machinery, or a mere collection of examples, not diminishing the generality of the earlier part of the schedule, but intended only to furnish a guide where the particular rule applies." Later he says: (1) "Unquestionably the rules applicable to a particular 'case' may cut down, and cut down very materially, the charging words in the earlier part" of the Schedule, and a little further on he says (2): "there are other provisions which it is not necessary to go through which seem to show that the 'first case', though clearly applying to a trade carried on partly abroad and partly in Great Britain, was not intended to apply to a trade carried on exclusively abroad." He then turns to the fifth Case and asks what is the meaning of "possessions" and he comes to the conclusion that a business carried on abroad was within the ambit of the word "possessions." The result was that he held that the fifth Case was more appropriate than the first Case, for upon the facts the trade was carried on exclusively abroad. If so it was not at the option of the Crown to tax the subject under Case I. because there was another Case, Case V., which fitted the case and controlled the large embracing words at the outset of Sch. D and limited the chargeability to tax. He held that the sum of 9219*l.* was a profit derived from a possession abroad within the fifth Case and that under that Case the only amount of profits that could be made chargeable to tax was the sum remitted. The tax upon that amount had already been paid and nothing, therefore, remained chargeable in respect of this sum. *Colquhoun* v. *Brooks* does, therefore, establish that it must be seen what Case is appropriate to the facts of the case, and if the fifth Case is appropriate it cannot be put into force to charge more

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(1) 14 App. Cas. 505.
(2) Ibid. 506.
(3) Ibid. 511.
(4) Ibid. 514.

(1) 14 App. Cas. 515.

(2) Ibid. 516.

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than the profits actually received at home. It is an important case as showing that the initial general words of Sch. D may be cut down by a later provision, because it is clearly indicated that those general words are to be made effective through the Cases which are more precise in their language, have certain rules applicable to them, and provide the channel through which the chargeability is to reach the subject. And if along one or other of those channels chargeability cannot be imposed, then to that extent the wide and general words with which Sch. D opens are to be treated as cut down.

That is the effect of *Colquhoun* v. *Brooks* (1), and there are later authorities to make it clear that this is so.

In *London Bank of Mexico and South America, Ld.* v. *Apthorpe* (2), a case decided in the Court of Appeal, Lord Esher M.R. came to the conclusion that there was really little, if any, divergence between the Court of Appeal and the House of Lords in *Colquhoun* v. *Brooks* (3), and he says (4): "Where a person carries on two businesses—one which is carried on in England in the ordinary sense of the words, and another wholly distinct business which is carried on abroad—then you cannot join the two businesses, and charge him in respect of them, together. You must deal with the one in England only as a business carried on in England, and with the other as a business carried on solely abroad, and assess him in respect of each accordingly. As to the business carried on abroad, he can only be assessed in respect of so much money as he gets out of that business, and as comes into his hands in England. That is the result of the decision in *Colquhoun* v. *Brooks.* (3)"

Colquhoun v. *Brooks* (3) was once more discussed in *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter.* (5) There Rigby L.J. discusses the effect of *Colquhoun* v. *Brooks* (3) and says: "The House of Lords went, it appears from the report, into a more minute examination of the sections of the Income Tax Acts than was made in this Court. The mode in which

(1) 14 App. Cas. 493.
(2) [1891] 2 Q. B. 378.
(3) (1888) 21 Q. B. D. 52; 14 App. Cas. 493.
(4) [1891] 2 Q. B. 378, 382.
(5) [1895] 1 Q. B. 580, 588, 589.

they arrived at the conclusion which they adopted was as follows: They seem to have been of opinion that, although the facts of the case came within the general words of Sch. D and the first Case, yet such general words might be cut down in some cases by other parts of the Act; and, not finding upon examination of the sections of the Act any means of assessing the profits of a trade or business, unless it was at any rate partly carried on in the United Kingdom, they thought themselves justified, notwithstanding the general words used, in limiting the operation of the first Case to cases where the Act provides means of assessment; and then considered the case of a business entirely carried on abroad as one coming within the fifth Case, under which persons receiving profits from 'foreign possessions' are assessable on such profits as they actually receive in this country." That is the effect of *Colquhoun* v. *Brooks*. (1) The appropriate Case has to be ascertained, and if an appropriate Case is found, it cannot be discarded and another Case made use of because it will give the Crown a better result in charging the subject. When the *San Paulo* case (2) came before the House of Lords, Lord Watson said: "When it has been ascertained that a person interested in the profits of a trade has his residence in the United Kingdom, in such sense as to bring him within the incidence of the Income Tax Acts, the only question remaining for consideration is, whether the measure of his liability is to be found in the First or in the Fifth Case of Sch. D; in the one case, he is liable to pay duty in respect of the net profits accruing to him from such trade; in the other, in respect only of such part of these profits as shall have been actually received by him in this country. But he cannot, according to the rule established in *Colquhoun* v. *Brooks* (1), escape from liability under the First Case, unless he is able to show that no part of the trade is carried on within the United Kingdom, or, what comes to precisely the same thing, that the trade is exclusively carried on in a country or countries outside the United Kingdom, whether subject to Her Majesty or not. If he succeeds in proving that fact, his liability will be under the Fifth Case."

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(1) 14 App. Cas. 493.

(2) [1895] 1 Q. B. 580; [1896] A. C. 31, 40.

It does not therefore follow from *Colquhoun* v. *Brooks* (1) that there may not be a liability in respect of a business the activities of which are carried on abroad; it has to be shown that the trade, or the employment—because we are dealing here with Case II., which deals with employment and not trade—is exclusively carried on in a country outside the United Kingdom.

Here we have to consider the case of a man the burden of whose duties are exercised outside the United Kingdom. But does that cover the whole of the contract under which his service was rendered? It is necessary to consider *Foulsham* v. *Pickles* (2) and to bear in mind the comments that were made in that case, which is admittedly very like the present one. Lord Cave there uses the words which I have already referred to. Lord Dunedin said (3): "When I say made in the United Kingdom I am not referring to the place where the signing of the contract took place. I am referring to the source of the profit which is the payment which the employers covenanted to make. This was payable and paid in London." Lord Buckmaster says (4): "He was engaged by the African Association, Ld., to serve them in West Africa as district supervising agent at a salary of 500*l.* and commission, and by the terms of his employment it was provided that he should not draw nor claim payment in the colony in respect of commission, but payment thereof should only be made to him through the office of the company in Liverpool," and they held upon the facts of that case that it was not shown that there was exclusive employment abroad and that, having regard to the mode of payment provided by the contract, the respondent's employment was not wholly out of the United Kingdom and was not, therefore, a possession within Case V. As in that case the assessment had been imposed upon the subject under Case V. only, the House of Lords agreed with the Court of Appeal in not allowing the matter to be remitted for a different Case to be made applicable, such as Case II.

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(1) 14 App. Cas. 493.
(2) [1925] A. C. 458.
(3) Ibid. 466.
(4) Ibid. 467.

Having examined those cases very carefully, I have come to the conclusion that the facts of the present case are similar to those in *Foulsham* v. *Pickles* (1) and that it is not established upon the facts found by the Commissioners that this employment is one wholly abroad. It is not, therefore, a case which falls within Case V. I think in loyalty to *Foulsham* v. *Pickles* (1) we are bound so to hold, but I have come independently to the same conclusion. Case II. provides that tax can be collected in respect of any profession or employment. It has been suggested that some limitation ought to be imposed upon the words of Case II. by reason of the Rules, but I do not find any grounds for saying that the ambit of Case II. is so reduced, and it seems, therefore, that the general words of Sch. D apply to the case and that Case II. is the particular Case applicable. Case V. does not apply, and the authority of *Colquhoun* v. *Brooks* (2), therefore, cannot be invoked to render the appellant immune from these assessments.

A subsidiary point was made that was based upon s. 18 of the Finance Act, 1922, which brought certain cases which hitherto fell to be charged under Sch. D to chargeability under Sch. E. The first proposition of Mr. Needham and Mr. King was that the appellant was not chargeable under Sch. D and therefore was not brought into charge under Sch. E. I have dealt with that point. Then it is said that although the appellant is brought into charge under Sch. E yet regard must be had to the rules applicable to Sch. E, and r. 6 provides: " The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom . . . ." and so once more the effect of the section is cut down by the rules. That argument does not appeal to me. It is stated in the very terms of s. 18 that the rules applicable to Sch. E are to " apply accordingly subject to the provisions of this Act." I cannot interpret the rules as withdrawing from the effect of s. 18 and Sch. E

(1) [1925] A. C. 458.

(2) 14 App. Cas. 493.

the very cases which it was the purpose of s. 18 to make chargeable under Sch. E.

For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

Romer L.J. The first question arising upon this appeal is whether before the coming into operation of the Finance Act, 1922, the appellant was chargeable in respect of the profits of his employment under Sch. D. For the purposes of this judgment I am going to assume that the appellant exercised his employment wholly abroad. On that assumption I turn to Sch. D and I find that under para. 1. of that Schedule tax under it "shall be charged in respect of—(*a*) The annual profits or gains arising or accruing— . . . . (ii.) to any person residing in the United Kingdom from any . . . . employment . . . . , whether the same be respectively carried on in the United Kingdom or elsewhere." Para. 2 of the Schedule says: "Tax under this Schedule shall be charged under the following cases respectively; that is to say,— . . . . Case II. —Tax in respect of any profession, employment, or vocation not contained in any other Schedule." Pausing there it would seem plain that the appellant was chargeable in respect of profits derived by him from his employment out of the United Kingdom. But it is said by the appellant that we cannot hold him to have been chargeable under Case II. of Sch. D without entirely disregarding the reasons given in the House of Lords for its decision in *Colquhoun* v. *Brooks*. (1) There the Court was dealing not with a case of employment but of trade, and what the Court had to decide in *Colquhoun* v. *Brooks* (1) was whether Mr. Brooks in respect of the trade carried on by him wholly in Australia was chargeable under Case I. or under Case V. It is extraordinarily unlikely that the Legislature intended that a person in the position of Mr. Brooks should be chargeable under both Case I. and Case V., seeing that if he were chargeable under Case I. he was chargeable in respect of the whole of his profits derived from the trade. If he were chargeable under Case V., he

(1) 14 App. Cas. 493.

would be chargeable only in respect of so much of the profits as was received in the United Kingdom. So that the House of Lords was confronted with the necessity of deciding under which of the two cases Mr. Brooks was chargeable. It was pointed out that if one read para. 1 (*a*) (ii.) of the Schedule and Case I. together and stopped there, it would seem plain that Mr. Brooks was chargeable under Case I. But the learned Lords, especially Lord Herschell and Lord Macnaghten, on looking at other parts of the Act, notably, the provisions relating to assessment and collection of the tax, were driven to the conclusion that the Legislature did not intend such a case as that of Mr. Brooks to come under Case I., but under Case V. Lord Macnaghten, after reading the parts of the Schedule to which I have already called attention, said (1): " This rule points to a business carried on out of Great Britain as well as to one carried on in Great Britain. But then when one tries to apply the rules and provisions of the Act relating to profits and gains from trades to a trade carried on exclusively abroad one gets into hopeless difficulties. If it is a partnership business, as this is, the return is to be made by the senior partner resident in Great Britain. But then the partner is to make the return ' on behalf of himself and the other partner or partners,' and his return is ' sufficient authority to charge such partners jointly ' and ' no separate statement ' is to be allowed in any case of partnership except for ' the purpose of the partners separately claiming an exemption ' or ' of accounting for separate concerns.' Then, again, the computation of the duty to be charged in respect of any concern in the nature of trade is to be made exclusive of the profits or gains arising from lands occupied for the purpose of such concern. That rule hardly seems applicable to a foreign mine or a sugar plantation in the West Indies. Then, again, by s. 106, every person engaged in any trade is to be chargeable by the commissioners acting for the parish or place where the trade is carried on, whether such trade is exercised wholly or in part only in Great Britain. And there are other provisions which it is not necessary to go

(1) 14 App. Cas. 515.

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through which seem to shew that the 'first case,' though clearly applying to a trade carried on partly abroad and partly in Great Britain, was not intended to apply to a trade carried on exclusively abroad." It is said on behalf of the appellant in this case that there are provisions in this Act which show that notwithstanding the clear words of r. 1 of Sch. D the second Case is not intended to apply to an employment exercised wholly abroad. We asked Mr. Needham in the course of his argument what other provisions in the Act ought to lead us to that conclusion and he said s. 106 in the Income Tax Act, 1842, and that was all. He said—and said truly, if I may say so—that that section did not provide machinery for collection of emoluments arising from an employment exercised wholly abroad; and he said that that is a conclusive reason for holding that Case II. does not apply to such an employment. I cannot take that view. Where there is a question whether a case falls within one charging section or another or within one Case of a charging section rather than another Case of the same charging section, it is very relevant to a solution of such a question that, if the Court adopts one construction there is no means provided by the Act for the collection of the tax, whereas if the Court adopts another construction means are so provided. The matter is not conclusive; it is merely a relevant consideration; and where, as here, there is no question whether these emoluments are chargeable under Case V. or Case II., I am not in the least impressed by the fact that if I hold that the case falls within Case II., no machinery is provided by the Act for the collection of the tax. If the tax is clearly imposed the omission of the Legislature to provide means for its collection must be regarded as an unfortunate omission and nothing else. It is only where a doubt arises whether the tax is chargeable by a certain section that the absence of machinery for collection becomes a relevant consideration. I should therefore have been prepared to hold that even under the Act of 1842 the appellant's earnings in respect of his employment abroad were charged by Sch. D, notwithstanding that s. 106 of the Act provided no machinery for

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its collection. But in point of fact we are dealing here with the Act of 1918, and in the Act of 1918, happily for the Crown, in such cases r. 4 of the Miscellaneous Rules applicable to Sch. D does provide machinery for collection of the emoluments payable in respect of an employment exercised wholly abroad. As I read *Colquhoun* v. *Brooks* (1), it was only because the House of Lords had to decide between Case I. and Case V. that s. 106 provided not only a relevant but almost a conclusive reason for the decision which the House gave.

That being so, the next question that arises on the appeal is whether the appellant is now chargeable in respect of his salary under Sch. E or is freed from all taxation in respect of it by virtue of the provisions of the Finance Act, 1922? It is plain that if, as I hold is the case, the appellant was chargeable under Sch. D in respect of profits arising from his employment, then according to the plain words of s. 18 of the Finance Act, 1922, those profits are no longer chargeable under that Schedule but are to be chargeable to tax under Sch. E. The section after so providing goes on to say " and the Rules applicable to that schedule shall apply accordingly subject to the provisions of this Act." It is argued on behalf of the appellant that if we look at r. 6 of the rules applicable to Sch. E, it will be found that though the Act of 1922 brings such cases as that of the appellant within Sch. E, r. 6 immediately throws it out of that Schedule again. Rule 6 is in these terms: " The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom." I cannot think that, the Legislature having said that such a case as the appellant's shall be chargeable under Sch. E in future, its intention is defeated because by the latter part of s. 18 " the rules applicable to that Schedule shall apply accordingly subject to the provisions of this Act." As was pointed out by the Solicitor-General, if the appellant's argument is to succeed on that point r. 6 would not only throw out of Sch. E such cases as the appellant's, but it would throw out of the Schedule all cases of employment

(1) 14 App. Cas. 493.

other than a public employment of profit. The rule will of course continue to apply to those cases to which it was applicable before. But I cannot think that the rule is intended to apply to such a case as the present with the result that it is thrown out of the Schedule altogether, and having been removed from Sch. D by the Act of 1922 is not chargeable under any Schedule at all.

For these reasons I think that the learned judge came to the right conclusion and that this appeal fails.

Maugham L.J. I am of the same opinion. I should like to state the way in which I regard the matter, so far as it relates to the first point—namely, the question of the assessability of the appellant under Case II. of Sch. D, para. 1 (*a*) (ii.), and s. 18 of the Finance Act, 1922. The facts are, of course, found in the Case. The only facts that I think it necessary to mention are these: the appellant is resident here; he is employed by an English company with a registered office here; the company owns a business which is controlled from here; and the remuneration of the appellant is for the most part received here. There is a finding in para. 5 of the Case which no doubt has to be borne in mind but ought not to be misunderstood. The finding is that the Commissioners "were satisfied that before the agreement of September 2, 1932,"—with regard to which we are not concerned—"no part of the respondent's work or duties fell to be performed or was performed in the United Kingdom." I am accepting that to the full, but I would observe that if one looks at the agreement one will find in almost every clause something to show that the appellant is not unconcerned with what the board of directors here may require him to do. He has to fulfil their instructions in many respects; he owes a duty to them; he has to render reports to them. The agreement is one which, of course, has to be construed according to English law, and in the full sense it is an English contract. In those circumstances, apart from the operation of s. 18 of the Finance Act, 1922, was the appellant assessable and chargeable under Case II. of Sch. D?

The first observation I want to make is that beyond all doubt the language of Case II. does extend to and relate to the appellant. Para. 1 of Sch. D of the Income Tax Act, 1918, refers to tax being charged on the annual profits or gains arising or accruing to any person residing within the United Kingdom—that is where the appellant resides for income tax purposes—from any employment, whether the same be carried on in the United Kingdom or elsewhere; and when we turn to para. 2 we find that in Case II. the tax under the Schedule has to be charged " in respect of any profession, employment, or vocation not contained in any other Schedule." For the present purpose I am omitting Sch. E, because that did not apply before the Act of 1922 came into force. So that since the employment may be carried on in the United Kingdom or elsewhere, the words I have mentioned are clearly sufficient to include the case of such a resident as the appellant who is employed abroad; and a fortiori if he is employed abroad by people residing in this country and employed under an English agreement. Then it is said that if we consider the case of *Colquhoun* v. *Brooks* (1) we shall see that the operation of the words to which I have referred in s. 1 of Sch. D of the Act of 1918, having regard to the decision of the House of Lords, must be limited or qualified in the way in which it is said they were limited or qualified by the House of Lords in that case, when the Act of 1842 was under consideration.

I am not going into any elaborate consideration of what *Colquhoun* v. *Brooks* (1) decided, having regard to the analysis of the case which the Master of the Rolls has given. I will only observe that I think it may be said with reasonable accuracy that *Colquhoun* v. *Brooks* (1), which related as we know to a trade carried on abroad, was decided on two main considerations: first, the consideration that according to the language of the Act the taxpayer was liable to be charged under Case V. in respect of income arising from a possession out of the United Kingdom, and, secondly, the fact that there was at that time an almost insuperable difficulty in charging the

(1) 14 App. Cas. 493.

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alleged taxpayer except under Case V., inasmuch as the machinery specified by s. 106 of the Income Tax Act, 1842, could not be applied in respect of a trade wholly carried on in a place where there were no Commissioners, and indeed in a country where the Sovereignty was not the Sovereignty of Great Britain. It was also pointed out that the terms of a section conferring certain exemptions or quasi exemptions, namely, s. 39 of the Act of 1842, tended strongly to show that the case of a trade carried on wholly abroad was not taxable, except as a foreign possession. There were therefore those three factors: Case V. was applicable; there was no machinery except under Case V.; and s. 39 tended strongly to show that Case I. could not be applicable.

In the present case, having regard to the fact that the company employing the appellant is a company situate in this country having its registered office here, and that the source of income of the appellant is here, it is clear (for it has now been decided by the House of Lords) that Case V. is not applicable, because the appellant is not in receipt of income arising from a possession out of the United Kingdom. *Pickles* v. *Foulsham* (1) contains a number of illuminating judgments, not all perhaps taking precisely the same view of the law, or rather of the construction of these difficult Acts. But when the matter went to the House of Lords (2) it was held very distinctly that a man in the position of Mr. Pickles in that case and, I may say, in the same position as the appellant in this case, is not enjoying income arising from a possession out of the United Kingdom if the source of his income is in this country; and Lord Cave observed (3) that he was far from saying that Mr. Pickles could not have been assessed under Case II. of Sch. D. Lord Buckmaster observed that, Mr. Pickles being a person residing in the United Kingdom, it would appear that he was liable to be taxed under Sch. D, para. 1 (*a*) (ii.), in respect of annual profits or gains arising from any trade. But, as pointed out, he had been in fact assessed under Case V. in para. 2.

Those observations are perhaps not any distinct guide

(1) [1924] 1 K. B. 323.
(2) [1925] A. C. 458.
(3) Ibid. 465.

to me in determining the position of the present appellant, but at any rate they do not tend in the opposite direction and the observations are a little difficult to explain, if it is reasonably clear, as it is suggested on behalf of the appellant, that the case of *Colquhoun* v. *Brooks* (1), which was in the minds of their Lordships and which was referred to, shows beyond doubt that Case II. does not apply to a case where the person employed renders his services wholly abroad.

To my mind there are two circumstances which have to be borne in mind in coming to the conclusion at which I have arrived. The proposition that there is a means of taxing the appellant under Case V. is one which for the reasons I have given is inapplicable in this case. The proposition that it is impossible or very inconvenient to tax him under Case II. owing to lack of machinery does not exist since the Income Tax Act, 1918, came into force, because by r. 4 of the Miscellaneous Rules applicable to Sch. D which forms a part of that Act, there is provision under which he can be taxed where he ordinarily resides. The rule replaces s. 32, sub-s. 1, of the Finance (No. 2) Act, 1915. The language of r. 4 of the Miscellaneous Rules is clearly and obviously different from the language of s. 106 of the Act of 1842, and the Court is bound to pay attention to the fact that there is now no lack of machinery for taxing a man resident in this country who receives income in respect of services rendered wholly abroad, whether in a colony or in a foreign land.

Accordingly, as I think, both the grounds which caused the House of Lords to decide that Mr. Brooks was not liable under Case I. of Sch. D fail to apply to the present case, and there is no reason for holding that Case II., which in terms covers the present case, is not an applicable Case under which the appellant may be charged, as he has been charged. For those reasons I agree with the decision of the learned judge in the Court below and I agree with my brethren in thinking the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Dawson & Co.; Solicitor of Inland Revenue.*

(1) 14 App. Cas. 493.

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[1934. D. 1435.]

Moneylender—Loan Transaction—Note or Memorandum of Contract—"Principal"—"Interest"—Former Loan Transactions—Bankruptcy of Borrower—Part of Loan paid to Moneylender in respect of Moneylender's Loss through the Borrower's Bankruptcy—Sufficiency of Memorandum—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *ss.* 6, 15.

The Moneylenders Act, 1927, s. 6, sub-s. 1, provides: "No contract for the repayment by a borrower of money lent to him . . . . by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower . . . . in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be."

Sub-s. 2: "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

Sect. 15, sub-s. 1: "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:—

"'Interest' does not include any sum lawfully charged in accordance with the provisions of this Act by a moneylender for or on account of costs, charges, or expenses, but save as aforesaid, includes any amount, by whatsoever name called, in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan;

"'Principal' means in relation to a loan the amount actually lent to the borrower."

A borrower, who had had several loan transactions with a firm of registered moneylenders, was adjudicated bankrupt in July, 1933, and the moneylenders proved in that bankruptcy for 257*l.* in respect of principal and interest but received no dividend in respect thereof. In May, 1934, the borrower applied to the moneylenders for a loan of 100*l.*, and, on the moneylenders refusing to make the loan, offered that 50*l.* out of the 100*l.* advance should be retained by the moneylenders to compensate them in part for the loss they sustained in his bankruptcy. The moneylenders thereupon made the loan, two cheques for 50*l.* each being made out by the moneylenders, one of which was endorsed by the borrower and returned to the moneylenders. The memorandum and promissory note, which were signed by the borrower, stated that an advance of 100*l.* had been made with interest at the rate of 64*l.* per cent. per annum to be repaid by fourteen consecutive monthly instalments of 10*l.* each. In the default clause in the memorandum the principal sum was stated to be 140*l.*, but the typist who typed the document said in an affidavit that she typed 140*l.* by mistake and that the sum ought to have been 100*l.* The moneylenders brought an action on the promissory note on a failure by the borrower to pay more than one monthly instalment:—

Held (affirming du Parcq J.), that the memorandum did not contain all the terms of the contract, inasmuch as the amount actually lent was only 50*l.*, and therefore the amount of the principal of the loan was not correctly stated according to the definition of "principal" in s. 15 of the Moneylenders Act, 1927; that the sum of 50*l.*, given by the borrower or retained by the moneylenders, was an amount in excess of the principal, paid to the moneylender in consideration of the loan, and was therefore "interest" within the definition of "interest" in s. 15, and accordingly that the interest charged on the loan was not truly stated in the memorandum, and that therefore the contract for the repayment of the money lent to the borrower by the moneylenders was, under s. 6, sub-s. 1, of the Act of 1927, unenforceable.

Per Slesser and Roche L.JJ., that the insertion in the default clause of the memorandum of 140*l.* instead of 100*l.* was a material error which would invalidate the transaction.

APPEAL from a decision of du Parcq J.

The plaintiffs, the Dunn Trust, Ld., were a firm of registered moneylenders. The defendant, Robert Feetham, had been for a number of years a member of a firm of stockbrokers, but had ceased to be a member of that firm in February, 1932. The defendant had had several loan transactions with the plaintiffs, extending over several years. In July, 1933, the defendant was adjudicated bankrupt and the plaintiffs proved in that bankruptcy for 257*l.* in respect of principal and interest, on which amount they were entitled to receive an immediate dividend on 141*l.*, a dividend on the remaining 116*l.*, in respect of interest being postponed until the other creditors had received a dividend of 20*s.* in the pound. In fact no dividend was paid.

In May, 1934, the defendant went to the plaintiffs' office and saw Mr. Kerman, the managing director of the plaintiff company. The evidence as to what took place was conflicting. The defendant said that he told Kerman that he wanted to borrow 50*l.*, and that Kerman then said that the only condition on which he would lend 50*l.* was that the defendant had to borrow 100*l.* and hand him back 50*l.*, which was to be put against the old debt. The judge, however, assumed that Mr. Kerman's evidence was correct to the effect that the defendant asked Mr. Kerman to lend him 100*l.* and said that he could pay back 10*l.* a month. Mr. Kerman declined to lend the money after what he had already lost. The defendant then suggested giving Mr. Kerman 50*l.* to compensate him in part for the loss he had already sustained. Mr. Kerman thereupon agreed to lend the defendant 100*l.* on condition that 50*l.* should be paid back by the defendant to the plaintiffs, or that the plaintiffs should retain 50*l.* out of the 100*l.*, to compensate them in part for the loss they had sustained by reason of the defendant's bankruptcy, and he instructed the secretary of the plaintiff company, Miss F. Jenkins, to draw up the promissory note and memorandum. Mr. Kerman drew two cheques in favour of the defendant for 50*l.* each and handed them to the defendant, who kept one cheque and endorsed the other cheque and handed it back to Mr. Kerman.

The memorandum of the contract, which was signed by the defendant, was in the following terms:—

"The Dunn Trust, Limited,
11 Princes Street,
Hanover Square, London, W.1.

"Note or Memorandum for the proposed advance to be made to me by you this 28th day of May 1934 of the sum of 100*l.* with interest at the rate of 64*l.* per cent. per annum on a promissory note payable to The Dunn Trust, Limited, 11 Princes Street, Hanover Square, W.1, or at such place as they may direct by fourteen consecutive monthly instalments of 10*l.* each commencing on the 28th day of June, 1934, and the balance on the fourteenth month and in the event of default in payment of any instalment or part thereof then the said The Dunn Trust, Limited, shall be at liberty at their option to demand payment of the whole of the balance of the said sum of 140*l*. remaining unpaid and interest at the rate aforesaid to the date of such demand thereupon the whole of the said balance with interest as aforesaid, whether in respect of principal or interest shall bear simple interest on that sum at the rate of 64*l*. per cent. per annum from the date of such demand until payment and until such demand continue to pay the said monthly instalments and to pay interest at the above rate upon all overdue instalments until payment, and all monies paid on account of the said advance and interest shall be applied firstly in payment of the interest due to that date and then to principal. I agree the above rate of interest as a fair rate of interest for the risk taken by you in advancing me the sum of 100*l*. on the security of the promissory note.

"Dated this twenty-eighth day of May, 1934.

"Out of this advance please retain the sum of fifty pounds to compensate you for part of the loss you sustained by reason of my last bankruptcy.

"I acknowledge to have received a true copy of this note or memorandum and that it was signed before the money was advanced or the security above mentioned given."

"(Signed) R. FEETHAM."

The promissory note signed in accordance with the memorandum was as follows:—

"London, May 28th, 1934.

"I, Robert Feetham,
of Hill Top, Warlingham,
promise to pay

The Dunn Trust, Limited, of No. 11, Princes Street, Hanover Square, W.1, or at such other place as you may direct the sum of 100*l*. together with interest at the rate of 64*l*. per cent. per annum by consecutive monthly instalments of 10*l*. each, the first of such instalments commencing on the twenty-eighth day of June, 1934, and the balance on the fourteenth month and in the event of default in payment

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of any instalment or part thereof then The Dunn Trust, Limited, shall be at liberty at their option to demand payment of the whole of the balance with interest as aforesaid to the date of such demand thereupon the whole of the said balance with interest as aforesaid shall immediately become due and payable and such balance of the said sum and interest so remaining due as aforesaid and whether in respect of principal or interest shall bear simple interest on that sum at the rate of 64*l.* per cent. per annum from the date of such demand until payment and until such demand to continue to pay the said monthly instalments, together with interest at the above rate upon all overdue instalments until payment and all monies paid on account of the said advance and interest shall be applied firstly in payment of the interest due to that date and then to principal.

"(Signed) R. FEETHAM
Hill Top
Warlingham."

The defendant paid only one instalment of 10*l.* on July 2, 1934.

On September 1, 1934, the plaintiffs brought an action against the defendant as maker of the promissory note of May 28, 1934, and stated the following particulars:—

Principal	£100	0	0
Interest from May 28 to July 2, 1934 ...	6	2	8
	106	2	8
Credit July 2, 1934, on account	10	0	0
	96	2	8
Interest from July 2, 1934, to the date hereof, date of demand	10	5	0
	£106	7	8

The plaintiffs further claimed interest from the date of the writ until payment or judgment on the sum of 96*l.* 2*s.* 8*d.* at the rate of 64*l.* per cent. per annum.

The following further particulars were also given on the specially indorsed writ for the purposes of Order III., r. 6, of the Rules of the Supreme Court :—

" (*a*) The plaintiffs are licensed moneylenders ; (*b*) the loan was made on May 28, 1934 ; (*c*) the amount actually lent was 100*l.* ; (*d*) the interest charged is 64*l.* per cent. per annum ; (*e*) the contract for repayment was made on May 28, 1934 ; (*f*) a note or memorandum of the contract was made and signed by the borrower ; (*g*) a copy of such document was delivered to the borrower on May 28, 1934 ; (*h*) the defendant has repaid 10*l.* ; (*i*) the amount due but unpaid is 96*l.* 2*s.* 8*d.* ; (*j*) such unpaid sum became due on July 2, 1934 ; (*k*) the amount of interest accrued due but unpaid on such sum is 10*l.* 5*s.* 0*d.*"

DU PARCQ J., on February 5, 1935, having heard the evidence of Mr. Kerman and of the defendant, said that he would assume that the evidence of Kerman was correct and that Kerman agreed that the plaintiffs should lend 100*l.* to the defendant on condition that 50*l.* should be paid back by the defendant to the plaintiffs, or that the plaintiffs should retain 50*l.* out of the 100*l.*, to compensate them in part for the loss they had sustained by reason of the defendant's bankruptcy. That sum was, however, not due from the defendant to the plaintiff company and there was no obligation on the defendant to pay it. The only right the plaintiffs had was to prove in bankruptcy against the defendant's estate. There was therefore no consideration for the payment by the defendant to the plaintiffs of the 50*l.* except a promise by the plaintiffs to lend him 100*l.* In his opinion the plaintiffs were not entitled to recover inasmuch as the provisions of s. 6 of the Moneylenders Act, 1927, had not been complied with, because the note or memorandum of the contract did not contain a true statement of the amount of the principal of the loan or of the interest charged on the loan. Looking at the substance of the transaction he had come to the conclusion, on Mr. Kerman's own evidence, that all that was lent by the plaintiffs to the defendant was 50*l.*, and he would be shutting his eyes to the realities of the transaction if he were to hold that the amount lent was 100*l*. If that were so it followed that the note or memorandum did not contain all the terms of the contract; indeed it did not contain the terms of the contract at all. The amount of the principal was wrongly stated in the note or memorandum. The word "principal" in relation to a loan was defined in s. 15 of the Act of 1927 as meaning "the amount actually lent to the borrower." Further, according to s. 15 the sum of 50*l*. paid by the defendant to the plaintiffs was interest and should have been so stated in the note or memorandum of the contract, because that section defined "interest" as including "any amount, by whatsoever name called, in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan." It would be playing with the facts if he were to hold that the 50*l*. paid by the defendant to the plaintiffs was paid otherwise than as consideration for the loan. It also followed that the interest charged on the loan was not truly expressed in the note or memorandum in terms of a rate per cent. per annum. Further, the agreement to pay 50*l*. as consideration for the loan was not set out in the note or memorandum at all. What the note or memorandum purported to show was an agreement that 100*l*. should be lent by the plaintiffs to the defendant and that the defendant on his own motion agreed to pay the plaintiffs 50*l*.

Mr. Levy had referred to the decision of the Court of Appeal in *B. S. Lyle, Ld.* v. *Chappell* (1) in support of the plaintiffs' case. That was a case where a man who owed money to moneylenders on a promissory note could not repay it and accordingly wished to renew the note. In other words, he wished to borrow money from the moneylenders to pay off the former loan. The Court of Appeal held, following the principle laid down in *Spargo's Case* (2), that as the loan was being repaid by money borrowed from the same lenders with different terms of payment it was not necessary that the lender should actually hand to the borrower the amount

(1) [1932] 1 K. B. 691.
(2) (1873) L. R. 8 Ch. 407.

due on the first loan and that the borrower should hand it back to the lender: it was sufficient if the lender cancelled the first loan and advanced the difference between the amount of the first loan and of the second loan. That case did not assist the plaintiffs in the present case, where both the amount of the principal and of the interest were incorrectly stated in the note or memorandum of the contract. There would therefore be judgment for the defendant.

The plaintiffs appealed, and the appeal was heard on May 22, 23; July 5 and 8, 1935.

In the course of the hearing before the Court of Appeal it was pointed out by the Court that there was a discrepancy in the note or memorandum, which in the default clause spoke of the "balance of the said sum of 140*l*. remaining unpaid" whereas at the commencement of the document it spoke of the "proposed advance . . . . of the sum of 100*l*.," and the further hearing of the appeal was adjourned in order to enable the appellants to file affidavits as to the cause of the mistake in the note or memorandum.

Mr. Kerman and Miss Jenkins, the secretary of the plaintiff company, made a joint affidavit in which Miss Jenkins deposed that the memorandum of contract dated May 28, 1934, and the promissory note were typed by her on the instructions of Mr. Kerman, who informed her that the sum of 100*l*. was being advanced payable with interest at 64 per cent. per annum by instalments of 10*l*. per month, the whole to be repaid within fourteen months, and that out of the sum of 100*l*. the defendant was going to repay to the plaintiffs 50*l*. to compensate them for the loss they had sustained in his previous bankruptcy, and that she was to put a clause into the memorandum to that effect. She said that her intention was to type 100*l*. in the default clause in the memorandum, but that by mistake she had struck a "4" on the typewriting machine instead of an "0" and made it 140*l*., but that the right sum should have been 100*l*. Mr. Kerman deposed that he gave the instructions set out above to Miss Jenkins to type the documents, but that he did not read the memorandum through when typed.

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Croom-Johnson K.C. and *R. F. Levy* for the appellants. It is clear from the joint affidavit of the managing director and the secretary of the appellant company that the insertion of 140*l.* in the memorandum instead of 100*l.* was a clerical error on the part of the clerk who was typing the document and who was not a party to the contract. The mistake is capable of rectification and does not vitiate the transaction.

[SLESSER L.J. Scrutton L.J. said in *Temperance Loan Fund, Ld.* v. *Rose* (1) that the Court of Appeal has apparently no power to amend the memorandum of a moneylending transaction.]

In *Temperance Loan Fund, Ld.* v. *Rose* (1) Scrutton L.J. commented upon *Gaskell* v. *Askwith* (2) and said that the headnote to that case, which says that "if the memorandum [required by s. 6 of the Moneylenders Act, 1927] states the date of the loan incorrectly, the contract is unenforceable, even although the inaccuracy has caused no deception and is due merely to a clerical error" did not correctly state the effect of the decision in that case. He pointed out that *Gaskell* v. *Askwith* (2) was not a case of a clerical error ; there was a real error in drawing up the memorandum, and he went on to say that a mere clerical error in a memorandum will not necessarily invalidate it. In *Reading Trust, Ld.* v. *Spero* (3) Scrutton L.J. held that an alleged difference between the terms of a promissory note and those of the memorandum of the contract in that the memorandum omitted to state the number of the instalments was too trivial to notice. In *Sherwood* v. *Deeley* (4) Macnaghten J. held that the memorandum of a moneylending transaction was not vitiated by an accidental slip in the date of the loan.

The learned judge who tried this case was wrong in holding that only 50*l.* was actually lent to the borrower and that the second 50*l.* was really interest, and that the memorandum was unenforceable because it did not truly state the terms of the transaction. In fact two cheques each for 50*l.* were drawn by the moneylenders and handed to the borrower,

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(1) [1932] 2 K. B. 522, 526.
(2) (1929) 45 Times L. R. 439, 566.
(3) [1930] 1 K. B. 492, 504.
(4) (1931) 47 Times L. R. 419.

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who endorsed one and handed it back to the moneylenders to compensate them for part of the loss they had sustained by reason of his last bankruptcy, as was stated in the memorandum. The case comes directly within the decision in *B. S. Lyle, Ld.* v. *Chappell* (1), where the Court of Appeal held that no objection could be taken to the repayment of a former loan by means of money borrowed on a fresh loan and that it was not necessary that the lender should actually hand to the borrower the amount due on the first loan and that the borrower should hand it back to the lender in payment of that loan ; if the lender cancelled the first loan and advanced the difference, if any, between the loans, he was entitled to say that he had advanced the amount of the second loan.

Harold S. Simmons for the respondent. The decision of the judge below was correct. The present case does not come within the decision of the Court of Appeal in *B. S. Lyle, Ld.* v. *Chappell.* (1) In that case a former loan was due for repayment. The moneylender renewed it and made a fresh loan, and described the total of the sum due and the new loan as money advanced under an agreement to borrow, and the Court held that the transaction was truly stated: see per Scrutton L.J. in *Lancashire Loans, Ld.* v. *Black.* (2) In *Lyle's* case (1) the previous loan was due for repayment at the time of the transaction described, whereas in the present case the defendant did not owe the plaintiffs anything ; the plaintiffs could not have sued the defendant, their only right was a right of proof against his estate in bankruptcy. The note or memorandum here does not state correctly either the amount of the principal of the loan or the interest charged on the loan, and therefore the contract for the repayment by the borrower of the money lent to him is, under s. 6, sub-s. 1, of the Moneylenders Act, 1927, unenforceable. Under s. 15 of that Act the term "interest" includes "any amount, by whatsoever name called, in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan," and the term "principal" is defined as meaning in relation to a loan "the amount actually lent to

(1) [1932] 1 K. B. 691.

(2) [1934] 1 K. B. 380, 407.

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the borrower." It is therefore clear, having regard to the definitions contained in that section, that the 50*l.* which was given by the defendant to the plaintiffs was paid by the defendant to the plaintiffs in consideration of or in respect of a loan and is interest, and therefore the rate of interest is incorrectly stated in the note or memorandum. Further "the amount actually lent to the borrower" was only 50*l.*, and not 100*l.*, as stated in the memorandum. Lord Hanworth M.R. said in *Parkfield Trust, Ld.* v. *Curtis* (1) that "the Act is intended to be exacting, and this compels us to read s. 6, sub-s. 2, precisely as it stands. When we do that it is clear that the memorandum with the promissory note attached does not contain what is required, with the result that the contract cannot be enforced." That dictum directly applies to the present case. The insertion in the memorandum of 140*l.* instead of 100*l.* was not a mere clerical error, and the Court has no power to amend the memorandum of a moneylending transaction: *Temperance Loan Fund, Ld.* v. *Rose* (2), per Scrutton L.J. Inasmuch as the memorandum does not truly record the contract between the parties the contract is unenforceable.

Croom-Johnson K.C. in reply. The mistake in the memorandum was common to both parties and the Court can correct it.

[GREER L.J. Can a mistake in a memorandum of a moneylender's contract be rectified after the time for delivering a copy of the memorandum to the borrower has expired?]

Sect. 6 of the Moneylenders Act, 1927, does not say that a contract for the repayment by the borrower of money lent by a moneylender shall be void if the conditions required by the section are not complied with, but only that it shall not be enforceable. The Court has just as much jurisdiction to rectify a mistake in a memorandum of a contract under the Moneylenders Act, 1927, as in cases under the Sale of Goods Act, 1893, or the Statute of Frauds. If the memorandum is read as a whole it is plain that the parties intended that 100*l.* should have been inserted where 140*l.* has been

(1) [1934] 1 K. B. 685, 692.

(2) [1932] 2 K. B. 522, 526.

actually inserted. The definition of "principal" in s. 15 of the Act of 1927 is "the amount actually lent to the borrower." Greer L.J. dealt with the meaning of "actually lent" in *B. S. Lyle, Ld.* v. *Chappell* (1) when he said: "I think money is lent within the meaning of that section [s. 6] if it is applied by the lender to the purposes of the borrower in any way which the borrower authorizes." The payment by the borrower of the 50*l.* to the moneylenders in respect of his old debt does not come within the definition of "interest" in s. 15 as being an amount in excess of the principal paid to the moneylender in consideration of a loan. The offer of the borrower to give the moneylenders a sum of money in order to compensate them for their loss in the borrower's previous bankruptcy, which was accepted by the moneylenders, is a good contract. In *Jakeman* v. *Cook* (2) a debtor, after having obtained an order of discharge under the Bankruptcy Act, 1869, promised for a new and valuable consideration to pay a debt which by virtue of s. 49 had been released by the discharge, and it was held that an action lay against him for the amount of the debt. Kelly C.B. said (3): "But is there anything to prevent him from doing that which is in itself praiseworthy, and which every man ought to do if he can—entering into an entirely new contract for ample consideration to pay his old debts? I can see nothing contrary to the spirit of the bankruptcy laws in a debtor, who has given up all his property and obtained his discharge, honestly making a new engagement to do justice to his creditors if he receives an adequate benefit." It was also held in *Wild* v. *Tucker* (4) that a contract by an undischarged bankrupt, in consideration of a small loan, to pay in full a debt of a large amount due from him at the commencement of and provable in his bankruptcy, was not void as being contrary to public policy or the policy of the Bankruptcy Acts, but was a valid and enforceable contract. This sum of 50*l.* is not a bonus or sum of money stipulated for by the moneylenders as a consideration for the loan, but is an application of money lent

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(1) [1932] 1 K. B. 691, 706.
(2) (1878) 4 Ex. D. 26.
(3) Ibid. 29.
(4) [1914] 3 K. B. 36.

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to the borrower at the request of the borrower and directly falls within the decision in *B. S. Lyle, Ld.* v. *Chappell.* (1)

GREER L.J. Several difficult questions have been raised in the course of this appeal, but on one ground I am quite clear that the judgment of the judge below was right, and that this appeal should be dismissed. The action was brought by The Dunn Trust, Ld., for money lent. The Dunn Trust, Ld. are moneylenders and come within the provisions of the Moneylenders Act, 1927. In many cases borrowers, having obtained money by way of loan from moneylenders, have refused to pay the money back, relying on some technical provision in the Act. That does not seem to me to be entirely just. The statute, however, now states in its various provisions the requirements of the Legislature as to how a moneylending business should be conducted in this country, and those provisions must be complied with.

In this case the relevant facts are these: The defendant, Feetham, had been a stockbroker for a number of years and was well acquainted with the way interest is calculated. He had had several moneylending transactions with the plaintiffs previous to the present one, extending over several years, and had escaped from liability upon the last of those previous moneylending transactions by his bankruptcy in July, 1933. As he had not obtained his discharge the moneylenders could not call upon the defendant to repay the money; all they could do was to prove in bankruptcy against the defendant's estate for a dividend. The defendant later went to the plaintiffs and wanted to borrow some more money. According to the evidence of Kerman, the managing director of the plaintiff company, which the judge accepted, the defendant said that if 100*l.* were lent to him by the plaintiffs he would agree to pay to the plaintiffs 50*l.* out of the 100*l.* to compensate them for the loss they had sustained through the defendant's bankruptcy.

One of the questions involved in the case is whether the note or memorandum that was signed by the defendant accurately states the transaction between the parties in the way required by s. 6 of the Moneylenders Act, 1927. Sub-s. 2 of that section provides that "the note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act." It is to be noted that, under the provisions of sub-s. 1 of s. 6, not only must the note or memorandum be signed by the borrower before the money is lent, but also a copy of such note or memorandum must be sent to the borrower within seven days of the making of the contract. Unless both of these events happen the contract for the repayment by the borrower of money lent to him by a moneylender is unenforceable.

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(1) [1932] 1 K. B. 691, 706.

The question then is whether when the memorandum is looked at it is right to regard the 50*l.* as a payment of interest within s. 15. If so then there is no true statement in the memorandum of interest at a rate per cent. per annum. The question to be determined is whether an agreement by the borrower, in consideration of being lent 100*l.*, that the lender might retain 50*l.* out of the 100*l.* towards compensating him for a loss on an old debt, does not make the 50*l.* interest within the meaning of the Act. If it is interest there was no true memorandum of the contract within s. 6 of the Act. Sect. 15 of the Act contains a definition of the term "interest." It provides that "'Interest' does not include any sum lawfully charged in accordance with the provisions of this Act by a moneylender for or on account of costs, charges, or expenses." It cannot be suggested that the 50*l.* comes within those words. The section goes on to provide: "but save as aforesaid, includes any amount, by whatsoever name called, in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan," and it is said that the 50*l.* comes within those words. I find it impossible to come to any other conclusion than that the 50*l.* retained by the

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moneylender was an amount in excess of principal paid to the moneylender in consideration of a loan. If that is so it concludes the case in favour of the defendant. The learned judge below decided that there was a loan for 50*l*. only, and that therefore the amount of the principal was not truly stated in the memorandum. I am inclined to disagree with the judge's decision that the loan was not a loan of 100*l*. but only a loan of 50*l*., but this is a matter of no consequence as in either case the memorandum untruly stated the rate of interest.

The learned judge also dealt with the question whether the interest was correctly stated, and came to the conclusion that the interest charged on the loan was not truly expressed in the note or memorandum in terms of a rate per cent. per annum. It is, however, not necessary to enter into a discussion of that question.

I am also inclined to the view that the statement in the memorandum that in the event of default in payment of any instalment or part thereof the moneylenders could "demand payment of the whole of the balance of the said sum of 140*l*. remaining unpaid" was not a mere slip of the typist in typing the document, but that the lady who typed the document intended to insert 140*l*. in the memorandum in the case of a default. I have some difficulty in coming to a clear decision as to the truth with regard to this matter, and I do not base my decision in the case on this point. The cases cited by Mr. Croom-Johnson do not seem to me to have any application in the present case. Even if the argument that the aid of the Court can be sought in order to rectify the mistake be accepted and rectification of the document were at all possible, inasmuch as the seven days after the making of the contract, within which a copy of the note or memorandum of the contract must be sent to the borrower, have elapsed, the contract, even if the memorandum were rectified, would nevertheless be unenforceable.

I ought perhaps to refer to the decision of the Court of Appeal in *B. S. Lyle, Ld.* v. *Chappell.* (1) In that case the

(1) [1932] 1 K. B. 691.

borrower agreed with the moneylender that the money lent on the loan in question should be applied in repayment of an existing debt of the borrower to the moneylender. The contract gave the moneylender nothing more than he was entitled to apart from the contract. That differentiates that case from the present case, where the moneylender was getting something from the borrower which he could not get except under the contract for the loan.

In my view the decision of the learned judge in the Court below was correct, and this appeal must be dismissed.

SLESSER L.J. I have come to the conclusion, having regard to the provisions of the Moneylenders Act, 1927, that no more than 50*l.* was actually lent to the borrower and that therefore the principal of the loan was only 50*l.* That being so it is impossible to say that the interest was accurately stated in the memorandum as being 64 per cent. per annum, and therefore as neither the principal of the loan nor the interest charged on the loan was accurately stated in the memorandum the contract for the repayment by the borrower of the loan cannot be enforced.

Speaking for myself, I have come to a clear determination with regard to the insertion of 140*l.* in the body of the memorandum instead of 100*l.* In my view, owing to the insertion of 140*l.* in the body of the memorandum, it is impossible to say that all the terms of the contract have been included in the memorandum. I do not think it is necessary to inquire whether the insertion of 140*l.* in the memorandum was due to a clerical error or any other kind of error, but only whether the insertion of that amount is material. Scrutton L.J. in *Reading Trust, Ld.* v. *Spero* (1) said: "It was said on the first loan that the note of the contract was for payment of 200*l.* and 60*l.* per cent. interest by consecutive monthly instalments of 20*l.* each, the first payable on February 13 and the balance on March 13. Such a contract, a loan for thirteen months, would need thirteen consecutive instalments; that is to say, 260*l.*, and a balance to discharge

(1) [1930] 1 K. B. 492, 505.

it. The promissory note said so, but it was said the contract ought to have said 'thirteen' and did not. This difference is too trivial to notice." Scrutton L.J. referred to that case in *Temperance Loan Fund, Ld.* v. *Rose* (1) and said: "In *Reading Trust, Ld.* v. *Spero* (2) I said that the particular difference there relied on was too trivial for notice. Of course that again must in each case turn upon what the particular variation is." The test therefore is whether the error in the memorandum is too trivial for notice or whether it is a material error. In the present case the affidavit of the lady who typed the document shows how she came to make the mistake. I do not think, however, that her evidence deals with the substance of the matter. A clerical error may be very serious. In the present case the error was a material error, as it is impossible to say that the insertion of 140*l.* in the memorandum as the amount of the principal sum due instead of 100*l.* was an error too trivial for notice. It has been suggested that this was a case of a mutual mistake, and that the Court has power to rectify the mistake, and reference was made to the jurisdiction of the Court to rectify mistakes in documents in cases under the Sale of Goods Act, 1893, and the Statute of Frauds. But I do not think that the analogy of cases under those Acts has any application to the present case. It is impossible for an application to be made by a moneylender to the Courts to rectify a mistake in a note or memorandum of the contract of loan required by the Moneylenders Act, 1927, or for a moneylender to talk of falsa demonstratio. I express no opinion with regard to the policy of the law as to moneylenders. That is not a relevant matter for this Court to consider. Those are matters for the Legislature to take into consideration.

I agree for these reasons that this appeal must be dismissed.

Roche L.J. I agree that this appeal should be dismissed, inasmuch as there was a failure by the moneylenders to set out in the memorandum of the contract required by s. 6 of the Moneylenders Act, 1927, a true statement as to the

(1) [1932] 2 K. B. 522, 527. (2) [1930] 1 K. B. 492, 505.

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amount of the principal of the loan—namely, the amount actually lent to the borrower, or as to the interest charged on the loan according to the definition of "interest" in s. 15 of that Act, and consequently under s. 6, sub-s. 1, of the Act the contract for the repayment by the borrower of the money lent to him by the moneylenders is unenforceable. I only desire to add a few words as to the distinction between *B. S. Lyle, Ld.* v. *Chappell* (1) and this case as I understand the distinction. In that case the memorandum truly represented the transaction between the parties. The borrower who owed money to the moneylender borrowed more money from the same moneylender and agreed that the moneylender should retain sufficient money out of the second loan to repay the amount due and unpaid on the first loan. Whereas in the present case the memorandum did not truly represent the contract between the parties, and the 50*l.* which was paid by the borrower to the moneylenders to compensate them for the loss they had sustained by reason of the borrower's bankruptcy was not paid in respect of any debt which the moneylenders could enforce, as the only right which the moneylenders had was to prove in the bankruptcy against the borrower's estate for a dividend. I do not accept Mr. Croom-Johnson's argument that payment by the borrower to the moneylenders of the 50*l.* was not part of the consideration for the loan. In my opinion it was part of the consideration. I think that the judgment of the learned judge in the Court below was right on that ground. As to the point with reference to the insertion in the body of the memorandum of 140*l.* instead of 100*l.*, I entirely agree with the observations of Slesser L.J.

Appeal dismissed.

Solicitors for appellants: *Woolfe & Woolfe.*
Solicitor for respondent: *John J. Hands.*

R. F. S.

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(1) [1932] 1 K. B. 691.

K. B. D.
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Dec. 20, 21.
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1935
June 24.

OFFER AND ANOTHER *v.* MINISTER OF HEALTH.

Local Government—Declaration by Local Authority of Area to be a Clearance Area—Clearance Order—Previous application by Local Authority to Minister of Health for advice—Preliminary Visit by Inspector before Public Local Inquiry—Subsequent Confirmation of Clearance Order by Minister—Validity—Housing Act, 1925 (15 *Geo.* 5, *c.* 14), *s.* 117—*Housing Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 39), *ss.* 1, 2, 11; *First Sched., para.* 4.

The Minister of Health has, under the Housing Acts of 1925 and 1930, the right to give advice to local authorities and to make inquiries in order to determine whether any powers under the Acts should be put in operation in any area, notwithstanding that under s. 2 of the Housing Act, 1930, the duty is imposed upon the Minister of deciding in a semi-judicial capacity whether or not a clearance order made by a local authority should be confirmed.

The representatives of a local authority applied to the Ministry of Health for advice with regard to the preparation of their 1933 five-year slum clearance programme and saw Mr. C., one of the Minister's chief housing and town planning inspectors. Mr. C. declined to give any advice as he was not sufficiently acquainted with the conditions in the borough. He subsequently visited the borough and inspected the exteriors of properties in various parts of the borough in company with the chief sanitary inspector of the borough, and Mr. C. told the sanitary inspector that the properties which he had seen appeared prima facie to be the class of property which other local authorities were including in clearance orders, but that he could not express any definite opinion nor was he in a position in any way to bind the Minister. The local authority subsequently made a clearance order in respect of certain properties the owners of which objected to the confirmation of the order. At the public local inquiry the above facts were disclosed. The clearance order was confirmed by the Minister, but Mr. C. took no part in deciding whether or not the order should be confirmed. The owners appealed under s. 11 of the Act of 1930 on the ground that the Minister in confirming the order had failed to act judicially:—

Held, upon the facts, that the statement of opinion by Mr. C., which did not bind the inspector who held the inquiry, nor the Minister of Health, was in no way inconsistent with the exercise of the duty imposed upon the Minister of deciding in a semi-judicial capacity, after a consideration of the objections and the report of the inspector who held the public local inquiry, whether or not the clearance order made by the local authority should be confirmed, and that the objectors had no cause of complaint against the confirmation of the order.

Decision of Swift J. affirmed.

APPEAL from a decision of Swift J.

On February 27, 1934, the Kingston-upon-Thames Borough Council made a clearance order under Part I. of the Housing Act, 1930, cited as the Kingston-upon-Thames (Canbury Passage Area A) Clearance Order, 1934.

The appellants, Henry John Offer, and his wife Vera Jenny Offer, owned a number of dwelling-houses included in the order. Notice was given to them of the making of the order and they objected in the manner provided by the Housing Act, 1930, to the Minister of Health against the confirmation of the order.

The Minister caused a local inquiry to be held on May 23, 1934, by Mr. A. R. Dent, one of his inspectors. The appellants and other objectors were represented at the inquiry by counsel. In the course of the inquiry it appeared from the evidence of Mr. Perry, the chief sanitary inspector of the Corporation, that before any official representation as respects the area in question was made by the Medical Officer of Health of the Borough, Mr. Collin, the senior housing inspector of the Ministry, had visited the area and inspected it with Mr. Perry. Mr. Perry was then asked whether it would be correct to say that the effect of what Mr. Collin said at this inspection encouraged the Corporation to declare the area a clearance area, and Mr. Perry replied that he would not put it as high as that. He thought that what Mr. Collin said was that the houses appeared to him to be houses which the Corporation could deal with under the Housing Act, 1930. The objectors' counsel thereupon took exception to this preliminary visit, of which his clients had had no notice and at which they had no opportunity of being present. The inspector replied that there was nothing irregular in the procedure and nothing to prejudice property owners concerned ; such preliminary visits took place all over the country.

The Corporation also called as a witness Councillor Knowlden, who admitted, in reply to questions by the objectors' counsel, that before declaring the area to be a clearance area he visited the Ministry of Health in company with the Town Clerk and other officials and discussed the proposed action of the

Corporation with regard to the clearance area with Mr. Collin, and said that the object of the visit to the Ministry was to get advice. He also admitted that there had been correspondence with the Ministry relating to the clearance area and the making and confirmation of the clearance orders. The Town Clerk refused to produce this correspondence, and the inspector declined to order the Corporation to produce it.

The Minister of Health, on August 14, 1934, confirmed the clearance order, and on September 1, 1934, notice of such confirmation was duly given.

On September 28, 1934, the present appellants appealed under s. 11 of the Housing Act, 1930, against the clearance order, the ground of the appeal being that the Minister of Health, in confirming the order, failed to act judicially as required by the Act.

Mr. W. H. Collin, a chief housing and town planning inspector in the Department of the Ministry of Health, made an affidavit in which he said: "On September 11, 1933, Councillor Knowlden, the town clerk, Mr. Perry, the chief sanitary inspector, and other officials of the Borough of Kingston-upon-Thames called at the Ministry of Health and were seen by me. They asked me to advise them generally with regard to their 1933 five-year slum clearance programme under Part I. of the Housing Act, 1930, and called my attention to the fact that the Minister in a circular, No. 1331, dated April 6, 1933, had stated that he was prepared to place the services of his staff at the disposal of local authorities who found any difficulty technical or otherwise in preparing their programmes. I declined to give any advice as I was not sufficiently acquainted with the conditions in the borough, but I agreed to pay a visit to the borough on September 26, 1933, with a view to seeing if I could give them any assistance. I cannot remember exactly what was said by me at the meeting of September 11, 1933, but I probably indicated in a general way the matters which the Council should consider before they decided upon any course of action. On or about September 26, 1933, I visited the borough and in company with Mr. Perry I inspected the exteriors of properties in various parts of the borough, but I did not enter any such properties. I cannot recollect whether the property in the Kingston-upon-Thames (Canbury Passage Area A) Clearance Order, 1934, was one of the properties I inspected. As a result of this inspection I informed Mr. Perry that on the information then before me the properties which I had seen appeared, prima facie, to be the class of property which other local authorities were including in clearance orders. I made it clear, however, that I could express no definite opinion and that I was not in a position in any way to bind the Minister and that it was for the Council to decide for themselves after full investigation whether in their opinion the properties were of such a nature as to necessitate any action on their part. . . . . I did not at any time either before or after the inquiry discuss with Mr. Dent the said order or the objections thereto received by the Minister or any other matters relative to the said order or the inquiry or Mr. Dent's report to the Minister. When Mr. Dent's report was received by the Ministry it was passed to me as a chief housing and town planning inspector in the ordinary course. I perused the report and I initialled it in pencil as an indication that I had seen it and had no observations thereon. When I perused the report I had no recollection whether the property therein referred to was one of the properties the exterior of which I had seen on September 26, 1933. It was no part of my duty to decide whether the order should be confirmed by the Minister or not and after I had initialled the report it was passed to the Housing Division of the Ministry without any comment by me oral or in writing."

Swift J. Before I started the hearing of this application, which is an application by Mr. H. J. Offer and his wife, under s. 11 of the Housing Act, 1930, in regard to a clearance order known as the Kingston-upon-Thames (Canbury Passage Area A) Clearance Order, 1934, I was asked to reserve my judgment in regard to the Birkenhead (Cambridge Place) Clearance Order, 1934, until I had heard the arguments in this case, because one of the points raised in the Birkenhead case (1) was clearly raised, and was the only point to be raised, in the case in which I am now giving judgment.

The facts in this case are really not in dispute and can be stated quite shortly. Mr. and Mrs. Offer owned a number of dwelling-houses which were included in the Kingston-upon-Thames (Canbury Passage Area A) Clearance Order, 1934, and, having received notice of the making of the order, they objected in manner prescribed by the Housing Act, 1930, to the Minister of Health. On May 23, 1934, the Minister caused a local inquiry to be held by one of his inspectors, Mr. A. R. Dent, at which inquiry objectors were given an opportunity of presenting their cases in opposition to the making of the order. Mr. Offer and his wife were represented at that inquiry by counsel. It was elicited by counsel on their behalf from Mr. Perry, the chief sanitary inspector of the Kingston Corporation, that, before any official representation as respects the area in question was made by the medical officer of health, Mr. Collin, the senior housing inspector of the Ministry, visited the area and inspected it along with Mr. Perry. Although Mr. Perry would not go the whole length, I think probably the suggestion was right that the effect of what Mr. Collin said at the inspection encouraged the Corporation to declare the area a clearance area. What the inspector said, according to Mr. Perry's recollection, was that the houses appeared to him to be houses which the Corporation could deal with under the Housing Act of 1930. Upon that counsel for the present applicants indicated to the inspector that he proposed to take exception to this preliminary visit of which his client had had no notice and at which they had had no opportunity of being present.

This case has been presented to me by Mr. Hill, who is very experienced in cases under this Act, very fully and clearly. His contention is that the Minister, acting through his officials, is at all times a judicial or quasi-judicial authority, or if he was not before objection was made a quasi-judicial authority, still by his conduct before objection was made he had

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(1) Reported sub nom. *Frost* v. *Minister of Health* [1935] 1 K. B. 286.

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put it out of his power to act impartially when the objection had to be heard and determined. I cannot distinguish the position of the Minister in the Birkenhead (Cambridge Place) Clearance Order case from the position of the Minister in the Kingston-upon-Thames (Canbury Passage Area A) Clearance Order case. It is not necessary for me to repeat what I said in the Birkenhead case (reported sub nom. *Frost* v. *Minister of Health.* (1)) I propose to follow it, and if this case goes to the Court of Appeal, then the reasons I gave in the Birkenhead case (1) can be examined and criticized as though I had given them in this case. In my view, the Minister here was doing his bounden duty under the Act in advising local authorities as to the scope and operation of the Act, and the steps which they could or might take under it, and I see no reason for thinking that he has done anything which is in the least degree wrong or which invalidates his order. This appeal must therefore be dismissed.

Mr. H. J. Offer and his wife appealed. The appeal was heard on June 24, 1935.

H. A. Hill for the appellants. The decision of Swift J. was wrong. The Minister of Health has to act judicially in deciding whether a clearance order made by a local authority under the Housing Act, 1930, shall be confirmed, and as he had given advice through Mr. Collin to the local authority in the present case before the clearance order was made, he could not afterwards act judicially in deciding whether or not he should confirm the clearance order. Swift J. has held that the Minister was under a duty to give advice to local authorities who come to him for advice. But there is no provision in the statute which goes that length and requires him to give advice to local authorities with regard to the making of clearance orders. In giving the advice which he did in this case the Minister acted without statutory authority, and he thereby acted in a manner inconsistent with the exercise of his judicial powers at a later date. The Minister

(1) [1935] 1 K. B. 291.

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must not give advice about a matter which is going to be the subject of future judicial action on his part. The Minister is not entitled to say that inasmuch as the advice was given by Mr. Collin, the inquiry was held by Mr. Dent and the decision whether or not the clearance order should be confirmed was by some one else in the Ministry, the advice was was not given by the one who decided the appeal. It was held by the House of Lords in *Local Government Board* v. *Arlidge* (1) that the owner of a house in respect of which a closing order was made was not entitled to see the report made by the Board's inspector upon the public local authority, as it was the report of the Local Government Board itself, nor was an order of the Board dismissing an appeal open to objection, because it did not disclose which of the officers of the Board actually decided the appeal. In the same way the Minister of Health cannot now be divided up into individuals. Whatever is done by any of the officers of the Minister is done by the Minister and therefore the advice given by Mr. Collin was given by the Minister.

Board of Education v. *Rice* (2) and *Errington* v. *Minister of Health* (3) were also referred to.

Sir Donald Somervell S.-G. and *Hon. H. L. Parker* for the Minister of Health were not called upon.

Greer L.J. This is an appeal by the owner of certain property which has been included in a clearance order in Kingston-upon-Thames. A clearance order under the Housing Act, 1930, was made by the local authority in reference to an area which is called the Canbury Passage Area A. After the clearance order was made objections were taken to the order in accordance with the statutory provisions of the Housing Act, 1930. It then became the duty of the Minister of Health to cause a public inquiry to be held by one of his inspectors in order that the objections of the objectors might be considered by the inspector who held the inquiry, and that

(1) [1915] A. C. 120.
(2) [1911] A. C. 179.
(3) [1935] 1 K. B. 249.

a report should be made by him to the Minister of Health before the Minister of Health decided whether the order should or should not be confirmed. In a case of that sort the order has no effect after there has been a public inquiry until the Minister has considered the results of the inquiry into the objections that have been made and the report of the inspector who has held the inquiry.

In these circumstances I have not the slightest doubt that in dealing with the subject-matter, when he comes finally to deal with it, the Minister is acting in a semi-judicial capacity, and once the objections have been heard, and the report has been made, the Minister is not entitled, as we held in *Errington* v. *Minister of Health* (1), to hear one side in the absence of the other; that is to say, that he is not entitled to hear the local authority in the absence of the property-owning objector, or to hear the property-owning objector in the absence of the local authority; he must in giving his final decision act judicially. Power to deal with matters of this kind is, however, expressly given by the statute to the Minister, who has a general jurisdiction to exercise his powers for the purpose of maintaining the good health of the inhabitants of this country, and he has under s. 117 of the Housing Act of 1925—which has to be read as one with and as part of the Housing Act of 1930—these powers: "If it appears to the Minister that owing to density of population, or any other reason, it is expedient to inquire into the circumstances of any area with a view to determining whether any powers under this Act should be put into force in that area or not, the Minister may require the local authority to make a report to him containing such particulars as to the population of the district and other matters as he may direct, and the local authority shall comply with the requirement of the Minister, and any expenses incurred by them in so doing shall be paid as expenses incurred in the execution of such Part of this Act as the Minister may determine."

That power is surely not confined to asking for a report without, first of all, making some investigation whether or

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(1) [1935] 1 K. B. 249.

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not it is a proper case for a report, or making an investigation after the report has been made in order to see whether or not further action should be taken ? To my mind, Parliament intended that these semi-official duties should be conferred upon a Minister who naturally will have some knowledge of the matter before he begins his semi-judicial inquiry, and will possibly have had communications with the local authority before what I have called the " lis " is joined between the objecting property owners and the local authority, and who will therefore have some knowledge and have given some opinion about the matter. All that was done in the present case is stated in Mr. Collin's affidavit which has been read by Mr. Hill. It is this : Before any step had been taken to put the Act into force with regard to any area in Kingston, and before any one knew whether there would be any objection by any property owner at all, one of the inspectors of the Ministry of Health was asked by the representatives of the Corporation of Kingston-upon-Thames for advice with regard to their 1933 five-year slum clearance programme. A circular was sent out by the Minister on April 6, 1933, in which he stated that he was prepared to place the services of his staff at the disposal of local authorities who found any difficulty, technical or otherwise, in preparing their programmes. Mr. Collin says in his affidavit : " I declined to give any advice as I was not sufficiently acquainted with the conditions in the borough." At that time there could not be, and was not, any complaint, as to what was done by the inspector upon this occasion. Then the affidavit goes on : " I cannot remember exactly what was said by me at the meeting of September 11, 1933, but I probably indicated in a general way the matters which the Council should consider before they decided upon any course of action." Then he inspected the district with the sanitary inspector, and he says : " As a result of this inspection I informed Mr. Perry that on the information then before me the properties which I had seen appeared, prima facie, to be the class of property which other local authorities were including in clearance orders." I cannot conceive what objection can be taken to that statement

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having been made by this inspector from the Ministry of Health to the Corporation. It did not in any way bind either that gentleman or any gentleman who might hold the inquiry, or the Minister of Health, to any opinion upon the question, which might ultimately have to be determined, whether certain objections, if made by the owners, ought to be given effect to, and the scheme, therefore, refused confirmation. It was in no way inconsistent with the duty which would have to be performed by the Minister when he came to exercise his powers of saying whether he would or would not confirm the order which was made by the local authority. I cannot conceive, therefore, the slightest ground for saying that what had been done in any way prejudiced the decision which was finally made by the Minister of Health on the report of the inspector and after full consideration of the objections that had been made.

It seems to me that the appellants in this case have no ground of complaint against the order that was made, and that is the only thing they can complain of; that is to say they can say that the order that was made was an order which ought to be quashed because it was made in a semi-judicial inquiry by a tribunal that had acted contrary to natural justice.

I see no reason whatever to suppose that the order was made under any such circumstances, or that anything improper was done from beginning to end. I agree, although perhaps not for entirely the same reasons, with the decision of the learned judge. I see nothing in the decision in this case at all inconsistent or contrary to the decision in *Errington* v. *Minister of Health.* (1) That case is quite a different case from the present one, dependent upon different facts and dependent upon the action of the Minister, after a public inquiry had been held, in continuing in private part of that inquiry after the public inquiry into the objections had been held and before the time when the Minister confirmed the order.

For these reasons I think the judgment was quite right, and the appeal will be dismissed with costs.

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(1) [1935] 1 K. B. 249.

LONDON

Slesser L.J. I am of the same opinion. The problem which has been raised in this case by Mr. Hill is one which has arisen in many cases where public authorities are entrusted both with executive functions and with quasi-judicial functions, and the principles upon which such public authorities have to proceed have been laid down with great clarity by the House of Lords in the leading case of *Local Government Board* v. *Arlidge* (1) following a decision of the House of Lords in *Board of Education* v. *Rice.* (2) Lord Haldane in his speech in *Local Government Board* v. *Arlidge* (3) points out that although the tribunal must act in accordance with natural justice, yet the actual limits of its obligations must be considered in respect of its other obligations imposed upon it by statute. Lord Haldane there says (4): "The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

What is complained of in this case—and this is the ground for impeaching this order under s. 11 of the Housing Act, 1930—is that the body which had in its quasi-judicial function to consider whether an order should be confirmed or not, had previously given advice upon the matter, or some part of the matter, upon which it had to determine and that, therefore, it did not arrive at the determination under the Act with an open mind. Applying the test, which Lord Haldane in *Arlidge's* case (1) tells us to apply, though the problem there was different, we come to this result, that the Housing Act of 1930 and the Act of 1925 both give to the Minister of Health the very right which is here complained of, that is to say, the right to give advice to local authorities and to make inquiries. My Lord has referred to s. 117 of the Act of 1925, which is to be read together with the Act of 1930, and which in terms says that: " If it appears to the Minister that owing to density of population, or any other reason, it is expedient to inquire into the circumstances of any area with a view to determining whether any powers under this Act should be put into force in that area or not, the Minister may require the local authority to make a report to him. . . . ." Our attention has been drawn to other consequential provisions in the Act of 1930 which make it clear beyond question that the Minister is acting fully within his rights in proffering or giving advice to local authorities. If the Minister has that right to give that advice, and also has the duty imposed upon him under s. 2 of the Housing Act of 1930 of confirming orders, it follows that he must or may carry out both these powers, and they cannot be said to be contrary to one another when the Legislature has in fact given him the authority both to do the one and to do the other—namely, first, give the advice, and secondly, consider quasi-judicially the confirmation of the order. Such a provision does not seem to me to be a very startling and it may be a very necessary one.

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(1) [1915] A. C. 120.

(2) [1911] A. C. 179.

(3) [1915] A. C. 125.

(4) Ibid. 132.

Here we are dealing with legislation conferring rights and obligations, but a very similar problem arose long ago in regard to building and similar contracts, where the parties to the contract had agreed that a person such as an engineer or

(1) [1915] A. C. 120.

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1935

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architect who had to perform certain duties as between the parties should also act as the arbitrator in any dispute between them. It was pointed out by Bowen L.J. in *Jackson* v. *Barry Railway Co.*(1), which is a leading authority on that class of case, that it was an essential feature in the contract between the parties that a dispute between them should be decided not by a stranger but by the company's engineer himself, who knew all the facts, and that the engineer could not be expected to come to such an adjudication free from any preconceived opinion.

Although we have not here an agreement but an obligation or right imposed by the Legislature, the result, to my mind, between the parties is the same, and to say that the Minister's order is invalid because he is doing the very thing which the Act authorized him to carry out, appears to me, with every respect to Mr. Hill, to be unarguable, and I agree with my Lord that there is no relation at all between this case and *Errington's* case, (2) which lays down the proposition that the Minister must act, when he has to perform quasi-judicial functions, in a quasi-judicial manner.

ROCHE L.J. But for the earnest argument of Mr. Hill, I should have thought this case was unarguable.

I agree that the appeal should be dismissed for the reasons given by the Lords Justices who have given judgment.

I only desire to add a few words with regard to *Errington's* case.(2) I do not desire to add anything to or to take anything away from that which I said in that case. With regard to the distinction between that case and this case I have nothing to add to that which has been said by Swift J. in his judgment in *Frost* v. *Minister of Health.* (3) I do not refer to the earlier remarks of the learned judge (4) with regard to *Errington's* case (2) where, with a humility that I cannot help thinking was undue, and perhaps ironical, he professed an inability to understand *Errington's* case (2), but I refer to a later passage in his judgment (5) where the learned

(1) [1893] 1 Ch. 238.
(2) [1935] 1 K. B. 249.
(3) [1935] 1 K. B. 286.
(4) Ibid. 291.
(5) Ibid. 293.

judge shows plainly that he quite well understood the difference between the two cases and expresses the difference so admirably that I desire to approve and adopt his language.

Appeal dismissed.

Solicitors for appellants: *H. Chandler.*
Solicitor for respondent: *Solicitor to the Ministry of Health.*

R. F. S.

COTTERILL *v.* PENN.

1935
May 18.

Criminal law—Mens rea—Killing of tame pigeon—Defences—Honest belief that it was a wild pigeon—Apprehension of damage to crops—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 23.

The Larceny Act, 1861, s. 23, provides that " Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction " be liable to a penalty:—

Held, that, to an information under that section for unlawfully and wilfully killing a house pigeon it is not a defence, either that the defendant killed the pigeon honestly believing that it was a wild pigeon which he might lawfully kill, or that he killed it because he entertained an apprehension that, although it had not as yet done so, it might possibly proceed to damage his crops.

Horton v. *Gwynne* [1921] 2 K. B. 661 followed.

Taylor v. *Newman* (1863) 4 B. & S. 89 and *Farey* v. *Welch* [1929] 1 K. B. 388 distinguished.

Hudson v. *MacRae* (1863) 4 B. & S. 585 and *Miles* v. *Hutchings* [1903] 2 K. B. 714 considered.

The reports of *Taylor* v. *Newman* and *Hudson* v. *MacRae* criticized.

CASE stated by justices for the county of Worcester.

On June 11, 1934, about 6 P.M. at Pedmore in the county of Worcester Mr. Stanley Millward released a number of homing pigeons in a road near to the private garden of Mr. Joseph Samuel Penn, hereinafter called " the defendant." One of the pigeons was released some seconds before the others, and almost immediately after it had been released it was shot by the defendant, who was in his garden for the purpose of shooting wood pigeons and magpies which had materially damaged his crops. The defendant was not able to see Mr. Millward and did not know that he was in the road releasing pigeons. There was brilliant sunshine at the time, and the pigeon flew between the defendant and the sun so that he had but little opportunity of judging what kind of pigeon was there. He did not see the pigeon for more than five yards, as it came over two rows of fruit trees at least fifteen feet in height between which the defendant was standing. If he had taken time to see the bird properly and out of the glare of the sun he might have known at once that it was not a wood pigeon, but by so doing he would or might have lost his shot. The pigeon, which was the property of Mr. Arthur Millward, was different both in size and colour from a wood pigeon. Owing to the defendant being partly dazzled by the sun and to the short space for which he saw the bird he could not have distinguished between a wood pigeon and a homing pigeon. The defendant honestly thought he was shooting a wood pigeon. The defendant picked up the bird and handed it to Mr. S. Millward very soon after and said to him that he was sorry but he had mistaken it for a wood pigeon, and he then and there offered to pay its value, but his offer was not accepted.

An information was preferred by Mr. F. Cotterill, hereinafter called " the informant," under the Larceny Act, 1861, s. 23 (1), against the defendant that he at the above mentioned time and place did unlawfully and wilfully kill a pigeon in such circumstances as did not amount to larceny at common law.

On July 13, 1934, at Stourbridge, the information was heard by the justices.

On the part of the informant it was contended that the honest belief that the pigeon was a wild pigeon was no defence to the information and that the defendant would only be justified in shooting the pigeon if it was actually doing damage to his crops; and that there was no obligation upon the informant to prove felonious intent in a charge of " shooting "

(1) The section so far as material is set out in the headnote.

a pigeon, but only where the charge was one of "taking," and he relied on *Horton* v. *Gwynne*. (1)

On the part of the defendant it was contended that it was necessary for the informant to prove that the pigeon was taken or killed with felonious intent; and that the defendant was entitled to kill the pigeon if he thought it was a wood pigeon which might damage his crops.

The justices were of opinion that there was no guilty mind on the part of the defendant to shoot or take the pigeon so as to deprive its owner of his property; that he shot it honestly believing it to be a wood pigeon about to alight in his garden to feed off his crops; and that, momentarily seeing one bird by itself flying low, he honestly believed that it was a wild bird, and killed it really and honestly thinking he was exercising his right of protecting his crops; and they therefore dismissed the information.

Wilfrid Lewis for the informant, appellant:

The justices were wrong in acquitting the respondent.

The information is laid under the Larceny Act, 1861, s. 23, which provides that "whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction," be liable to a penalty. None of the reasons given by the justices for dismissing the information was well founded. It was not a good defence to the information that the respondent had no mens rea or guilty intention to kill or take the pigeon so as to deprive its owner of his property, or that he honestly believed that it was a wild bird in which there was no property. To steal a tame or house pigeon from the dovecot was always larceny at common law, and in that offence mens rea is a necessary ingredient, but it does not seem to have been any offence at common law to kill or take a tame pigeon when at large. The house pigeon was, however, a useful article of food, and various Acts were therefore passed making it an offence quite distinct from larceny and independent of mens rea to kill such pigeons or

(1) [1921] 2 K. B. 661.

to shoot at or near a dovecot. These Acts were perhaps in the nature of laws for the preservation of game. Several of these Acts are set out in the case of *Dewell* v. *Sanders* (1), as, for example, 18 Edw. 2, tit. "Leet"; 2 Edw. 4, c. 14; 8 Eliz. c. 15; and 1 Jac. 1, c. 27. The last mentioned Act by ss. 2 and 7 made it an offence to shoot at or within a certain distance of any dovehouse, irrespective altogether of mens rea, and that Act remained in force until it was repealed by the Game Act, 1831 (1 & 2 Wm. 4, c. 32). Meanwhile the Act of 1826 relating to larceny, 7 & 8 Geo. 4, c. 29, was passed, s. 33 of which provided that "if any person shall unlawfully and wilfully kill, wound or take any house dove or pigeon, under such circumstances as shall not amount to larceny at common law," he, being convicted, shall pay a fine; and it does not appear that mens rea was an ingredient in that offence. Sect. 23 of the Larceny Act, 1861, is almost identical with the last mentioned section, and, like it, cannot be intended to deal with the offence of killing or taking with guilty intention a tame pigeon, whether in or out of the dovecot, as that offence was already covered by the common law. The fact that the section in question includes the word "take" as well as the word "kill" does not imply that mens rea is essential to an offence thereunder. The word "take" may mean either "catch," or "carry away" as in larceny. An analogous provision, namely s. 6 of 5 Geo. 3, c. 14, had made it an offence wilfully and wrongfully to take or kill in the night time any rabbit, and in *Rex* v. *Glover* (2) it was held that "take" in that section meant catch. Sect. 17 of the Act of 1861 now in question makes it an offence to take or kill a rabbit, and the word "take" must there have the same sense as in the earlier Act. Sect. 21 of the Larceny Act, 1861, makes it an offence to steal any bird, beast, or other animal ordinarily kept in confinement or for any domestic purpose, not being the subject of larceny at common law, or to kill with intent to steal the same. When that section was passed, a tame pigeon if in a dovecot was the subject of

(1) (1618) Cro. Jac. 490.

(2) (1814) Russ. & Ry. 269.

larceny at common law, and in *Reg.* v. *Cheafor* (1) it had been held that a tame pigeon with free access to the open air was also the subject of larceny; and, therefore, that section, so far as it deals with the stealing of a pigeon, can only refer to the case of a pigeon away from the dovecot, which was not covered by the common law. If the Legislature had intended that mens rea should be an ingredient in the offence under s. 23 of this Act, it would have used appropriate language like that of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 41, which makes it an offence "unlawfully and maliciously" to kill any bird being the subject of larceny at common law or being ordinarily kept in confinement or for any domestic purpose. In *Taylor* v. *Newman* (2) there may be observations of the judges which seem to show that mens rea is necessary to the commission of an offence under s. 23, but these observations as reported are difficult to understand or to reconcile with the decision of the same judges in *Hudson* v. *MacRae* (3), where they held that, to an information under s. 24 of this Act for unlawfully and wilfully attempting to take fish in water where another person had a private right of fishery, it was no defence that the accused had no mens rea. In *Horton* v. *Gwynne* (4), where, as in the present case, the defendant was charged under s. 23 with killing a pigeon, it was held that mens rea was not necessary to the offence and that the belief of the defendant that the pigeon was a wild one afforded no excuse. In the later case of *Farey* v. *Welch* (5), where the defendant was charged under the same section with taking a pigeon, it was held that felonious intent was necessary to the offence and that a taker who honestly believed that the pigeon was his own was not within the section. It may be somewhat difficult to reconcile that case with *Horton* v. *Gwynne* (4), but it is to be observed that it does not purport to dissent from *Horton* v. *Gwynne* (4), and that it is distinguishable from that case, inasmuch as it is not a case of killing but of taking a pigeon. If

(1) (1851) 2 Den. C. C. 361.

(2) 4 B. & S. 89.

(3) 4 B. & S. 585.

(4) [1921] 2 K. B. 661.

(5) [1929] 1 K. B. 388.

there is any conflict between the two cases *Horton* v. *Gwynne* (1) should be preferred, for, otherwise it would seem to follow that the Legislature passed two inconsistent provisions in the same year—namely, s. 23 of the Larceny Act, 1861, and s. 41 of the Malicious Damage Act, 1861. In *Rex* v. *Wheat and Stocks* (2) it was held by the Court of Criminal Appeal to be no defence to a prosecution for bigamy that the prisoner believed in good faith and on reasonable grounds that he had been divorced from his wife when in fact he had not; and the Court there commented upon and did not follow the previous decision of a majority of that Court in *Reg.* v. *Tolson* (3) to the contrary effect. In *Rex* v. *Denyer* (4) it was held that the offence under s. 29, sub-s. 1, of the Larceny Act, 1861, of uttering a letter demanding property with menaces was complete without proof of felonious intent. Secondly, the justices were wrong in thinking that it was any defence to an information under s. 23 that the respondent shot the pigeon honestly believing that it was about to feed off his crops. *Taylor* v. *Newman* (5) does not support that view, for there the pigeon was actually feeding on the prosecutor's land and damaging his crops.

Theodore Turner for the defendant, respondent:

The justices were right in dismissing the information.

It was a good defence to the information laid against the respondent under the Larceny Act, 1861, s. 23, that the respondent had no guilty mind to deprive its owner of his property, but honestly believed that it was a wild bird. It is true that in *Horton* v. *Gwynne* (1) it was held that in the circumstances of that case it was not a defence to a charge under s. 23 that the defendant bona fide believed that the pigeon shot by him was a wild one, but there are reasons why that case cannot be relied upon by the present appellant. That case is distinguishable from this, for the defendant there had a better opportunity than the respondent here for seeing that the pigeon was tame and not wild, and it was there held that the defendant acted wilfully and unlawfully, while here it is found that the respondent acted honestly. Further, the decision in that case is wrong in law, because it conflicts with the earlier case of *Taylor* v. *Newman* (1) and the later case of *Farey* v. *Welch.* (2) Further, it was a good defence to the information under s. 23 that the respondent shot the pigeon honestly believing that it was about to alight in his garden and feed off his crops and that he was exercising his right of protecting his property. A reasonable apprehension on the part of a landowner that the pigeon will probably damage his crops justifies him in killing it even though it has not in fact damaged them: see *Taylor* v. *Newman* (3), per the judges in the course of the argument; and *Miles* v. *Hutchings.* (4) It would be unreasonable to require that an owner of valuable crops should wait until they are actually damaged before taking steps to protect them. A man threatened with assault may endeavour to prevent it before it is actually committed, and the same principle applies here. The question whether the respondent's apprehension of damage to his property was reasonable was one of fact and degree. Here the justices found that the respondent honestly and reasonably believed that the pigeon was about to feed off his crops. That finding would have constituted a defence even if the respondent had known that the pigeon was tame, but here he honestly believed that it was wild. *Horton* v. *Gwynne* (5) is distinguishable, for in that case when the defendant shot the pigeon it does not appear either that he was on his own property or that the pigeon was flying over it, whereas here the respondent was in his own garden, which had previously been damaged by pigeons, for the express purpose of protecting it. Moreover, s. 23 only applies to the killing, wounding, or taking of any house dove or pigeon "under such circumstances as shall not amount to larceny at common law." A house pigeon was the subject of larceny at common law when in the dovecot, but

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(1) [1921] 2 K. B. 661.

(2) [1921] 2 K. B. 119.

(3) (1889) 23 Q. B. D. 168.

(4) [1926] 2 K. B. 258.

(5) 4 B. & S. 89.

(1) 4 B. & S. 89.
(2) [1929] 1 K. B. 388.
(3) 4 B. & S. 89, 90.
(4) [1903] 2 K. B. 714.
(5) [1921] 2 K. B. 661.

it was doubtful whether it was the subject of larceny when away from the dovecot. These words of the section imply that its object is to make it larceny to kill, wound, or take a house pigeon when away from the dovecot: see *Taylor* v. *Newman* (1) and *Farey* v. *Welch.* (2) Unless these words bear that meaning it is difficult to explain the difference between s. 21 and s. 23. If the view be correct that s. 23 applies only to cases of larceny, it is obvious that this information was improperly laid against the respondent, whose act is not suggested to have been larcenous. In *Farey* v. *Welch* (2) Avory J. said that the words "under such circumstances, etc.," have reference to cases where the killing and taking away of an animal ferae naturae are one continuous act and therefore not larceny, and to cases where the question was whether the bird has been reclaimed so as to be the subject of larceny.

Wilfrid Lewis in reply. To a charge under s. 23 of unlawfully and wilfully killing a pigeon, it is no defence that the person charged honestly believed that it was about to damage his crops, if it was not in fact doing so.

LORD HEWART C.J. This is a case stated by justices for the county of Worcester arising out of an information preferred by the appellant against the respondent under the Larceny Act, 1861, s. 23, for unlawfully and wilfully killing a pigeon in such circumstances as did not amount to larceny at common law. The justices dismissed the information, and the question is whether in doing so they were correct in point of law. [His Lordship stated the facts and the conclusions of the justices as set out in the Case, and continued as follows:]

Sect. 23 of the Larceny Act, 1861, which is a compendious section, provides that: "Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction," pay a penalty.

One contention on behalf of the respondent was that to sustain a charge under the section it is necessary to prove that

(1) 4 B. & S. 89.

(2) [1929] 1 K. B. 388.

the pigeon was killed or taken with felonious intent. In my opinion, although the section says "unlawfully and wilfully," it does not require the element of mens rea beyond the point that the facts must show an intention on the part of the person accused to do the act forbidden, which was here that of shooting. It seems to me to be immaterial that the bird which the respondent shot was of a different kind from that which he thought that he was shooting. If the section had used the word "maliciously," the state of mind of the person charged would have been relevant. But using the terms "unlawfully and wilfully" the section seems to me only to mean that the person accused intended to shoot and that the shooting was without a lawful excuse.

Another contention for the respondent was that he was entitled to kill the pigeon if he thought that it was a wood pigeon which might damage his crops, and the justices, adopting that contention, were of opinion that he was not liable, inasmuch as he shot the pigeon honestly believing it to be a wood pigeon about to feed off his crops. He shot the pigeon not because it was actually damaging his crops, but because he thought that it might or would do so—an event which was purely hypothetical. It seems to me to be an undue straining of the authorities to say that an apprehension of danger which may or may not turn out to be real is a lawful excuse. If such an extension of the principle were to be permitted one wonders where the process would end.

It has been suggested that there appears to be some dissidence of view in the decided cases, but it is to be observed that they do not all deal with the same subject-matter. It may be said that this case is sufficiently covered by *Horton* v. *Gwynne* (1), and more particularly by the judgment of Avory J. in that case. As to the other cases that have been cited, I think it is fairly obvious that in the case of *Taylor* v. *Newman* (2) the judgment of Blackburn J. has been misreported. In the reports both of that case and of *Hudson* v. *MacRae* (3), decided in the same year by the same judges,

(1) [1921] 2 K. B. 661.

(2) 4 B. & S. 89.

(3) 4 B. & S. 585.

there are manifest errors. I am disposed to think that the passage in the judgment of Blackburn J. in the former case, which has been specially referred to, was misreported rather than to think that he contradicted himself.

I would further remark with regard to s. 23 that the words "kill, wound, or take" any house dove or pigeon are qualified by the later words "under such circumstances as shall not amount to larceny at common law." These last words are obviously ungrammatical, for circumstances cannot properly be said to amount to larceny at common law or at all. The section must mean that the act done, denoted by the words "kill, wound or take", is such as shall not amount to larceny. The later qualifying words in the section "under such circumstances as shall not amount to larceny at common law," are not apt words in reference to the word "kill" or "wound," but they may be apt in reference to the word "take," which is ambiguous, sometimes meaning "snare" and sometimes "carry away." It is hard to understand how wounding could be done in such circumstances as would make it amount to larceny at common law, but, if these latter words are limited so as to be qualifying words after the word "take," their meaning becomes fairly obvious.

However that may be, I am satisfied in view of the cases, and more particularly of *Horton* v. *Gwynne* (1), that the appeal should succeed, and that the justices were wrong in each of the two limbs of their opinion; and that the case should go back to them with a direction to find the charge proved.

AVORY J. I am of the same opinion. I think that we should follow the case of *Horton* v. *Gwynne* (1), where Darling J. said in reference to the circumstances of that case in which there had been the shooting by the defendant of a house pigeon in the belief that it was a wild pigeon: "In those circumstances I think that his act was both wilful and unlawful. It was not accidental. It was not as if he had shot at a crow and killed a pigeon unintentionally. The pigeon was

(1) [1921] 2 K. B. 661.

not his property, and it was not in fact a wild one. From a very early date house pigeons were specially protected by law, as being a valuable species of property. In my opinion s. 23 was intended to protect house pigeons against being killed, not only by persons who killed them knowing them to be house pigeons, but also by persons who did not know that. A person who shoots a pigeon which turns out to be a house pigeon must take the consequences of his act." In my view none of the other cases which have been referred to is inconsistent with *Horton* v. *Gwynne.* (1) I myself pointed out there that to my mind *Taylor* v. *Newman* (2) was not inconsistent with that case, but that, on the contrary, had it not been for the fact that in *Taylor* v. *Newman* (2) the defendant was found to have acted in defence of his property, the Court would have held that the mere act of killing a house pigeon was an offence if the defendant had killed the bird at which he was shooting. In *Taylor* v. *Newman* (2) the facts were that the birds at the time when they were shot were actually feeding on the defendant's crops, and it was not a case such as the present case where the respondent acted under a mere apprehension of possible future danger. If a man actuated by such an apprehension had an excuse under the section, he might justify going on another person's land and killing that person's pigeons because he feared that they might damage his own crops. A mere apprehension of such danger is not in my opinion a sufficient excuse, and *Taylor* v. *Newman* (2) does not decide that it is.

Apart, however, from that consideration I think that the report of *Taylor* v. *Newman* (2) is a most unsatisfactory report, because it makes the offence charged a different one from that dealt with by the judges. The defendant was charged with unlawfully and wilfully killing the pigeon. According to the report Blackburn J. said " the appellant did nothing in the nature of taking property belonging to his neighbour so as to make his act a larceny." I cannot regard that as a correct version of what he said. On the other hand, Mellor J. said : " There may be cases of pigeons

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(1) [1921] 2 K. B. 661. (2) 4 B. & S. 89.

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being killed without any claim of right or colour of justification, though under circumstances not amounting to larceny; and s. 2 (*sic*) was probably introduced to make such an unlawful and wanton act punishable." Because of that passage I said in *Horton* v. *Gwynne* (1) that the decision in *Taylor* v. *Newman* (2) supported the view which we were then taking. I would only add a few words in regard to *Farey* v. *Welch* (3), which, it has been suggested, is inconsistent with *Horton* v. *Gwynne.* (1) In *Farey* v. *Welch* (3) the charge was that of unlawfully and wilfully taking a pigeon, and not of killing or wounding a pigeon; and, speaking for myself, I think that the real ground of the decision there was that there had been no taking of the pigeon, and my own judgment was based expressly on that ground. If the facts of that case be looked at, it appears that the appellant and the respondents were in the habit of keeping pigeons on their neighbouring premises, that they had been from time to time on each other's premises to recover straying pigeons, that the appellant was admitted to the respondents' premises on a certain day and claimed that a particular pigeon was his property, that it was handed to him for examination, that he attempted to take it away, and that a constable was then called in and the appellant given into custody. In my view, there was there no taking of the pigeon, and therefore that case is not inconsistent with *Horton* v. *Gwynne.* (1) We have not here to decide a case in which a person is charged with taking a pigeon which is not his property.

The other comparatively recent case of *Miles* v. *Hutchings* (4) has no application to the present case, for it turned upon the "unlawfully and maliciously" killing a dog, and it was there held that the justices had not directed their mind to the question whether there had been a malicious killing of the dog. Wills J. there said: "It is in my judgment not enough that he should be under the impression, right or wrong, that he is justified in protecting his premises from trespass or (as in the present case) his master's property

(1) [1921] 2 K. B. 661.
(2) 4 B. & S. 89.
(3) [1929] 1 K. B. 388.
(4) [1903] 2 K. B. 714, 716.

from injury; if he knows that much less violent measures would attain his object, he is not justified in resorting to such means as killing or wounding the animal." It is clear that here much less violent means than shooting would have attained the respondent's object, for he had only to walk into his garden to prevent the pigeon from damaging his crops.

I agree that the case should be remitted to the justices to find that the offence charged was committed.

HUMPHREYS J. I am of the same opinion. The case of *Horton* v. *Gwynne* (1) seems to me to be a direct authority that the contention of the appellant is right, and I concur in the view that the decision in *Taylor* v. *Newman* (2) is not inconsistent with that case. I have greater difficulty in determining whether *Horton* v. *Gwynne* (1) is consistent with *Farey* v. *Welch* (3), but I think that the distinction between the two cases which has been referred to by Avory J. is sufficient to enable this Court to say that *Horton* v. *Gwynne* (1) is directly in point without expressing any opinion upon *Farey* v. *Welch.* (3) Each of these cases arose under s. 23 of the Larceny Act, 1861, but *Farey* v. *Welch* (3) was a decision upon the word "take" in that section, while in *Horton* v. *Gwynne* (1) and in the present case the word dealt with is "kill." Having regard to these two decisions, this Court would seem to be at liberty to construe s. 23 for itself, and construing it without reference to previous authorities I think that its meaning is clear. Considerable assistance is to be derived from s. 21, which brings under the law of larceny the stealing of any domestic animal though it be not the subject of larceny at common law. If any one steals a house pigeon he can be dealt with under that section. Then s. 23 deals specifically with pigeons as distinct from all other birds, making it an offence unlawfully and wilfully to "kill, wound, or take" any house pigeon. In my view the subsequent words of that section "under such circumstances as shall not amount to larceny at common law" mean that the act described shall be an offence although the elements comprised in it are not sufficient to constitute larceny at common law. The probable explanation of these very inapt words may be that which has been suggested by my Lord—namely, that they apply only to the word "take" and not to the word "kill" or "wound." I find it difficult to attribute a meaning to the words of the section, unless it was intended to provide that any unlawful and wilful act done to a pigeon should be an offence without consideration of the question whether it constitutes larceny at common law. That would seem to have been the meaning attributed to the section in *Horton* v. *Gwynne* (1), which we are here following.

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(1) [1921] 2 K. B. 661.
(2) 4 B. & S. 89.
(3) [1929] 1 K. B. 388.

Appeal allowed. Case remitted.

Solicitors for appellant: *Robbins, Olivey & Lake, for Sharpe & Millichip, West Bromwich, Staffs.*

Solicitors for respondent: *Hatchett Jones & Co., for William Waldron & Son, Brierley Hill, Staffs.*

J. R.

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July 25, 26.

HIS MAJESTY'S POSTMASTER-GENERAL *v.* BIRMINGHAM CORPORATION.

[1934. P. 1557.]

Telegraph—Postmaster-General—Town Planning Scheme—Municipal Undertaking—Street Level—Alteration—Expenses—Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *s.* 15—*Telegraph Act,* 1878 (41 & 42 *Vict. c.* 76), *ss.* 2, 7.

The Telegraph Act, 1878, s. 7, provides that "where any work proposed to be done in the execution of an undertaking authorized by an Act of Parliament involves . . . . an alteration . . . . in any telegraphic line of the Postmaster-General, and provision is not otherwise made by enactment, agreement, or otherwise with respect to such alteration" then (upon notice being given) the undertakers shall pay all the expenses incurred.

In pursuance of an approved scheme under the Housing and Town Planning Acts, 1909 and 1919, the Birmingham Corporation widened certain streets and altered the line or level thereof. In so doing they altered the telegraphic lines. Upon a case stated the question was raised whether the Postmaster-General or the Corporation should pay the expenses of altering the telegraphic lines :—

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(1) [1921] 2 K. B. 661.

Held, that the work had been carried out in conformity with a scheme under the Town Planning Acts, but that provision had been " otherwise made . . . . with respect to such alteration," by the Telegraph Act, 1863, s. 15, and that the expenses were payable by the Postmaster-General under that section and not by the Corporation under the Telegraph Act, 1878, s. 7.

The word " enactment " in s. 7 of the Act of 1878 is not confined to the particular enactment which authorizes the alteration, but includes general Acts of Parliament.

Decision of Goddard J. [1935] 1 K. B. 404 affirmed.

APPEAL from a decision of Goddard J. upon a special case. (1)

This case raised the question whether the plaintiff or the defendants in the action were liable to bear the expense of alterations to telegraphic lines in connection with a town planning scheme in the Birmingham district, having regard to the provisions of the Telegraph Act, 1863, s. 15 (2), and the Telegraph Act, 1878, s. 7. (3)

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(1) [1935] 1 K. B. 404.

(2) The Telegraph Act, 1863 : " Sect. 15. In case the body having the control of any street or public road at any time hereafter resolves to alter the line or level of any portion of such street or road under, in, upon, over, along, or across which any work of the company constructed either before or after the passing of this Act is placed, the company shall from time to time be bound, on receiving one month's notice of such intended alteration, and at their own expense, to remove such work, and to replace the same in such position and manner in all respects as may be required by such body, or, in the event of difference between such body and the company, in such position and manner in all respects as may be determined . . . . by two justices . . . . ."

It was agreed that the plaintiff occupied the position of the company for the purposes of the above section.

(3) The Telegraph Act, 1878, by s. 2, defines the expression " Act of Parliament " as meaning " any Act of Parliament whether public general, local and personal, or private, and includes the order confirmed by any such Act. . . . ." The expression " undertaking " is defined as meaning " the works or undertaking of whatever nature the execution of which is authorised by an Act of Parliament as above defined."

" Sect. 7. Where any work proposed to be done in the execution of an undertaking authorized by an Act of Parliament involves or is likely to involve an alteration either temporarily or permanently in any telegraphic line of the Postmaster-General, and provision is not otherwise made by enactment, agreement, or otherwise

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Post-master-General *v.* Birmingham Corporation.

The action, which was brought by the Postmaster-General, was begun by writ dated July 12, 1934, and the amount claimed was 916*l.* 15*s.* 9*d.* The point of law was then referred to the Court for decision upon a case stated by counsel.

The case, so far as material, was as follows:—The Birmingham (South) Town Planning Scheme was approved by the Minister of Health pursuant to the provisions of the Housing and Town Planning Acts, 1909 and 1919, and came into operation on March 27, 1925. The Quinton, Harborne and Edgbaston Town Planning Scheme was approved by the President of the Local Government Board pursuant to the Housing and Town Planning Act, 1909, and came into operation on May 31, 1913.

The schemes contained provisions for the construction of certain new streets and the widening of certain existing streets as therein respectively provided. Since the schemes came into operation the defendants had widened certain existing streets and had constructed a certain new street—namely, road No. 16, as provided for in clause 4 of the Quinton, Harborne and Edgbaston Town Planning Scheme. Each of these widenings was carried out by them in pursuance of a resolution passed by the City Council of Birmingham to carry out the work and in conformity with and for the purpose of carrying into effect the Birmingham (South) Town Planning Scheme.

The construction of the new street was carried out by the defendants in pursuance of a resolution passed by the City Council of Birmingham to carry out the work, and in conformity with and for the purpose of carrying into effect the Quinton, Harborne and Edgbaston Town Planning Scheme.

The defendants had power to carry out such widenings and to construct the new street and for that purpose to alter

with respect to such alteration or to giving notice to the Postmaster-General thereof or to the expenses of or incidental thereto, the following enactments shall apply. . . . . ."

Sub-ss. 3 and 4 of s. 7, then provide that the Postmaster-General may either make the alterations at the expense of the undertakers, or may require the undertakers to make them at their own expense.

the line or level of the existing road apart from the provisions of the scheme under the Birmingham Corporation (Consolidation) Act, 1883, the Highway Act, 1835, and the Public Health Act, 1875, and contended that they would have had power to do so apart from the provisions of the scheme under the Development and Road Improvement Funds Act, 1909, and the Housing and Town Planning Acts, 1909 and 1919.

Each of the widenings mentioned above and the construction of the new street necessitated the alteration of the line or level and in some cases of the line and level of some portion of an existing street or public road under the control of the defendants and involved an alteration in telegraphic lines vested in the plaintiff which were situate under, in, upon, over, along, or across such portion of such existing street or road.

A dispute having arisen between the parties whether the expenses of and incidental to the alteration of these telegraphic lines should be borne by the defendants pursuant to the Telegraph Act, 1878, s. 7, or by the plaintiff pursuant to the Telegraph Act, 1863, s. 15, it was agreed between the parties that in order to avoid delay the alterations should be carried out by the plaintiff, and the defendants should undertake to pay to the plaintiff all expenses of and incidental to the alterations of the telegraphic lines, unless they should be able to establish that they were entitled to require the plaintiff to carry them out at his own expense. The defendants accordingly executed under their common seal and delivered to the plaintiff undertakings in writing, and the plaintiff carried out the alterations in the telegraphic lines referred to at a total cost of 916*l.* 15*s.* 9*d.*, of which the sum of 889*l.* 19*s.* 4*d.* was the cost of the alterations involved by the street widenings, and 26*l.* 16*s.* 5*d.* was the cost of the alterations involved by the construction of the new street.

The question for the opinion of the Court was whether, if no such undertakings as aforesaid had been given by the defendants, the defendants would have been entitled to require the plaintiff to carry out the alterations to telegraphic lines at his own expense having regard to the provisions of the Telegraph Act, 1863, s. 15, and of the Telegraph Act, 1878, s. 7.

Goddard J. held that the work had been carried out in conformity with a scheme under the Town Planning Acts, but that provision had been "otherwise made . . . . with respect to such alteration" by s. 15 of the Telegraph Act, 1863; that the word "enactment" in s. 7 of the Telegraph Act, 1878, was not confined to the particular enactment which authorized the alteration but included general Acts of Parliament, and that therefore the expenses of altering the telegraphic lines were payable by the Postmaster-General under s. 15 of the Telegraph Act, 1863, and not by the Corporation under s. 7 of the Telegraph Act, 1878.

The Postmaster-General appealed.

Sir Thomas Inskip A.-G. and *Harold Murphy* for the Postmaster-General. Goddard J. was wrong in deciding that s. 15 of the Telegraph Act, 1863, concludes this case against our contention. That Act was an Act giving general powers—a "Clauses" Act—and at the time it was passed the Postmaster-General was not the owner of the telegraph lines; it was only in 1868, by 31 & 32 Vict. c. 110, that Parliament decided that the telegraph system should be transferred to and be worked by the Postmaster-General, and s. 2 of that Act incorporated the Act of 1863 except so far as the same was expressly varied or was inconsistent with its terms. Now, the position is governed by s. 7 of the Telegraph Act, 1878, which throws the cost of the alteration of telegraph lines on to the undertakers of the work which involves such alteration, where "provision is not otherwise made by enactment, agreement, or otherwise with respect to such alteration." No agreement has been made whereby the cost should fall on the Postmaster-General, but it is contended on behalf of the Corporation that "by enactment" it has been otherwise provided, and the enactment relied on is s. 15 of the Telegraph Act, 1863. That contention is unsound. The words in s. 7 of the Act of 1878 "and provision is not otherwise made by enactment" means an express enactment relating to the particular alteration of the telegraph lines. No such enactment can be invoked, and it would certainly be forcing the language of s. 7 to say that powers conferred in 1863 upon a body having the control of streets have any application to powers long subsequently given under the Housing, Town Planning, etc., Acts.

Tyldesley Jones K.C. and *Trustram Eve K.C.* for Birmingham Corporation. The decision of Goddard J. was right. Under s. 15 of the Telegraph Act, 1863, if the alteration in the telegraph line is caused by an alteration in the line or level of the street then the cost falls upon the Postmaster-General and not upon the local authority. The term "Act of Parliament" is defined in s. 2 of the Telegraph Act, 1878, as meaning "any Act of Parliament whether public general, local and personal, or private," and therefore the work done under s. 7 of the Act of 1878 need not be work done in consequence of special Acts of Parliament but may be work authorized by general Acts of Parliament. Sect. 33 of the Public Health Act, 1925, empowers highway authorities to widen and alter the level of streets, and a highway authority which can do this is clearly within s. 15 of the Telegraph Act, 1863. The work which involves an alteration of the telegraph lines need not be authorized by a special Act of Parliament; it may be authorized under a general Act of Parliament. Under s. 6 of the Telegraph Act, 1863, power was given to telegraph companies to open or break up any street or public road and alter the position thereunder of any pipe for the supply of water or gas, and under s. 15 the expenses of such alteration had to fall upon the company, and further there was an express provision in sub-s. 4 of s. 8 that the company should pay all reasonable expenses to which the body to whom the pipe belonged might be put on account of superintendence. The closing words of s. 7 of the Telegraph Act, 1878, provide that "where under section eight of the Telegraph Act, 1863, any body to or by whom any such pipe as in that section mentioned belongs or is used require that the position of any telegraphic line of the Postmaster-

General or any part thereof should be altered, the enactments of the present section shall apply," and under s. 7 the expense of such work is put upon the persons incurring the work. The fact that s. 7 of the Act of 1878 deals specifically with the expense of altering the position of any telegraph line if required for a particular purpose, and leaves other expenses under the other provisions of the Act of 1863 untouched points to the generality of this legislation. The powers of a highway authority to alter the line or level of a street are entirely statutory. The Act of 1863 applies to the Postmaster-General as owner of the telegraph lines after 1868. The resolution of a body having the control of any street to alter the line or level of any portion of the street referred to in s. 15 of the Act of 1863 must be made under some statutory power, but that is not limited to statutory powers in existence at the date of the Act of 1863 but includes future statutory powers for widening streets by whatever Act such power is given: see *Associated Newspapers, Ld.* v. *City of London Corporation.* (1) It does not matter in what character the power is given by legislation. It is sufficient that Birmingham Corporation is a county borough which has the control of all streets within its area. It is not necessary to consider the position of a non-county borough.

[He was stopped.]

[SLESSER L.J. referred to *Hill* v. *Wallasey Local Board.* (2)]

Harold Murphy in reply referred to *Postmaster-General* v. *Corporation of London* (3), and *Postmaster-General* v. *Hendon Urban District Council.* (4)

SLESSER L.J. This is an appeal from a judgment of Goddard J. upon a special case stated between the Postmaster-General as plaintiff and the Lord Mayor, Aldermen and Citizens of the City of Birmingham as defendants. The question which has to be determined is whether the Corporation of Birmingham, the defendants, can or cannot require the

(1) [1916] 2 A. C. 429.
(2) [1894] 1 Ch. 133.
(3) (1898) 78 L. T. 120.
(4) [1914] 1 K. B. 564.

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Slesser L.J.

Postmaster-General to carry out certain alterations to telegraph lines at his own expense. The question arises in the following way: Under the provisions of the Housing, Town Planning, etc., Act, of 1909, as amended by the Housing, Town Planning, etc., Act of 1919, power is given to a local authority in the circumstances stated in those Acts to execute certain works in their area. It is not necessary for the purposes of this case to consider the provisions of that Act generally, because there is no question here but that in the two schemes which we have here to consider everything was validly done. There is a provision in s. 55 of the Act of 1909 that " The Local Government Board "—now the Ministry of Health—" may prescribe a set of general provisions . . . . for carrying out the general objects of town planning schemes, and in particular for dealing with the matters set out in the Fourth Schedule to this Act." In the Fourth Schedule to the Act are set out " Matters to be dealt with by general provisions prescribed by the Local Government Board." Paragraph 1 is as follows: " Streets, roads, and other ways, and stopping up, or diversion of existing highways." Power is also given to the Local Government Board to define the area to which the scheme is to apply, and the authority who are to be responsible for enforcing the observance of the scheme, and for the execution of any works which under the scheme are to be executed by the local authority. The local authority as defined includes the council of any borough or urban or rural district. The Act of 1919, amending the 1909 Act, does not contain any amendment which is material, in my view, to any matter which has to be considered in this case. Acting under those two statutes, or more exactly acting under the Act of 1909 in the case of one scheme, and under the Act of 1909 as amended by the Act of 1919 in the case of the other scheme, two town planning schemes have been ordered in the County Borough of Birmingham. Those schemes, as finally approved, are annexed to the case. Having recited in the case of the Birmingham (South) Town Planning Scheme, and in the case of the Quinton, Harborne and Edgbaston Town Planning Scheme that the Lord Mayor, Aldermen and Citizens of the

City of Birmingham have prepared town planning schemes, the schemes are approved. The Corporation is designated as the authority; that is under clause 2 of the scheme. "New streets" are defined in clause 4 of the Birmingham Scheme, and in clause 4 of the Quinton Scheme, as streets which are to be constructed or altered in accordance with these schemes.

It became necessary in the execution of those schemes, to alter the position of certain telegraph lines, and the question arises, at whose expense must those alterations be made. It is said in para. 3 of the case that "each of the widenings was carried out by them in pursuance of a resolution passed by the City Council of Birmingham to carry out the work and in conformity with and for the purpose of carrying into effect the Birmingham (South) Town Planning Scheme," and "the Quinton, Harborne and Edgbaston Town Planning Scheme." Then it says: "but the defendants had power to carry out such widenings apart from the provisions of the scheme under the Birmingham Corporation (Consolidation) Act, 1883, the Highway Act, 1835, and the Public Health Act, 1875." Later it says: "The construction of such new street was carried out by the defendants in pursuance of a resolution passed by the City Council of Birmingham to carry out the work and in conformity with and for the purpose of carrying into effect" the schemes.

Now in my opinion that is a finding in the case to the effect that the City Council of Birmingham, in carrying out this work involving expenditure on the telegraph lines, was carrying it out in pursuance of a resolution under the Housing, Town Planning, etc., Acts, and in no other way. The case points out that had the defendants wished they could have carried out these widenings under other Acts, but I think the finding is one to the effect that they did in fact purport to act under the Housing, Town Planning, etc., Acts. In those circumstances the question arises which statute is to apply to the work so done. Is it the statute of 1878, or is it an earlier statute of 1863, to which I shall refer? It is provided by s. 7 of the Telegraph Act of 1878: "Where any work proposed to be done in the execution of an undertaking authorised by an Act of Parliament involves or is likely to involve an alteration either temporarily or permanently in any telegraphic line of the Postmaster-General, and provision is not otherwise made by enactment, agreement, or otherwise with respect to such alteration or to giving notice to the Postmaster-General thereof or to the expenses of or incidental thereto," certain enactments shall apply. Here there is no question but that no agreement was made for any special provision ; that is not suggested in the case. If the provisions of that Act do apply, then by sub-s. 3 of s. 7 it is provided : " If the Postmaster-General by his counter-notice states that it is his intention himself to make such alteration, it shall be lawful for such Postmaster-General by himself or his agents to make the same, and the undertakers or their agents shall pay to the Postmaster-General all the expenses incurred by him of and incidental thereto, and the amount of any loss or damage sustained by him in consequence thereof."

In the present case it has been argued by the Attorney-General on behalf of the Postmaster-General that there being work proposed to be done in the execution of an undertaking authorized by an Act of Parliament, namely, this town-planning scheme, of widening or altering these roads, that, as it involves, or is likely to involve, an alteration in the telegraphic line of the Postmaster-General, there is a duty upon the Birmingham Corporation to pay to the Postmaster-General the expenses incurred by him of and incidental thereto under sub-s. 3 of s. 7 of the Telegraph Act, 1878.

On the other hand the Birmingham Corporation wish to take advantage of the words of the section : " and provision is not otherwise made by enactment." They say that provision has been otherwise made by enactment with regard to this work proposed to be done in the execution of an undertaking authorized by an Act of Parliament, and they say that the enactment which so provides is to be found in an earlier Act dealing with telegraphs—namely, the Telegraph Act, 1863, which was passed before the telegraphs came under the control of the Post Office at all, and when they were still under the control of private companies. The section which really is the critical section for our consideration is s. 15 of the Telegraph Act, 1863, which is to the following effect: "In case the body having the control of any street or public road at any time hereafter resolves to alter the line or level of any portion of such street or road under, in, upon, over, along, or across which any work of the company constructed either before or after the passing of this Act is placed, the company shall from time to time be bound, on receiving one month's notice of such intended alteration, and at their own expense, to remove such work, and to replace the same in such position and manner in all respects as may be required by such body." There is no question here but that the Birmingham Corporation, as the highway authority for Birmingham, the urban authority under the Public Health Acts, are in control of the streets and public roads herein affected, but two questions arise for consideration in order to decide whether or not the Corporation can take advantage of s. 15 of the Act of 1863. If they can, they can call upon the Postmaster-General, who is the legal successor of the companies, at his own expense to do the work. The two matters which have to be considered are as follows: first, the Attorney-General contends that the language of s. 7 of the Telegraph Act of 1878 is not appropriate to deal with the case of any other general Act at all. He puts the case in this way: It is true that the earlier part of s. 7 refers to an undertaking authorized by an Act of Parliament, but when the section goes on to say, "and provision is not otherwise made by enactment," the section is referring to a particular enactment which deals with the specific alteration of works authorized, and that unless such provision is made in the particular enactment, the undertakers—that is the corporation—are liable for the expenses. Now here it is not suggested by the Birmingham Corporation that there are any particular provisions made in the particular Act as to the expenses being paid by the Postmaster-General, and if they are to succeed they must have recourse to general legislation other than this particular Act empowering them.

As a matter of fact they are not here empowered by an Act at all; they are empowered by a scheme under the Housing, Town Planning, etc., Act, which, under that Act, it is said, has to be read as if it were enacted in that Act and which comes within the definition of an Act of Parliament in s. 2 of the Act of 1878, including an Order confirmed by any such Act. So no question can arise on that point. In my opinion Goddard J. was right in holding that it is not possible so to limit the language of s. 7 of the Act of 1878. I think that the words " provision is not otherwise made by enactment " mean what they say—namely, that if it can be found that the authority doing the work is doing it, or can do it, in circumstances where there is provision made by any other enactment, that they fall within s. 7; in other words, the language is general in its application. Goddard J. says this (1): " In spite of the powerful argument of the Attorney-General, I do not think that I should limit the meaning of the word ' enactment ' in the way that is suggested. It could have been made much more clear in the section if that had been the intention, and I think that the proviso in s. 7 means that if there is an enactment with respect to ' such alteration '—that is to say, the alteration involved in the carrying out of this work—then that enactment is to apply and not s. 7; and, as this work alters the line or level of the portion of the street or road, I hold that it falls within s. 15 " —that is s. 15 of the earlier Act to which I have referred. In those circumstances all I can say is that I entirely agree with the view expressed by Goddard J.

Mr. Tyldesley Jones, on behalf of the Birmingham Corporation, apart from relying upon the unqualified language of this provision, points out another reason why we should take the view which the language itself on the face of it suggests. He points out that in the closing words of s. 7 of the Act of 1878 occurs this language: " And where under section eight of the Telegraph Act, 1863, any body to or by whom any such pipe as in that section mentioned belongs or is used require that the position of any telegraphic line of the

(1) [1935] 1 K. B. 411.

Postmaster-General or any part thereof should be altered, the enactments of the present section shall apply, and for such purposes any such body shall be deemed to be ' undertakers '." Under s. 6 of the Act of 1863 provision is made for the telegraph company, to open or break up any street or public road and alter the position thereunder of any pipe for the supply of water or gas. By s. 8, sub-ss. 1 and 2, it is provided: " In the exercise of the aforesaid powers, the company shall also be subject to the following restrictions: (1.) they shall cause as little detriment or inconvenience as circumstances admit to the body or person to or by whom any pipe for the supply of water or gas belongs or is used; (2.) before they alter the position of any such pipe, they shall give to the body to whom the same belongs notice of their intention to do so . . . ." In such a case, therefore, at that time it is clear that under s. 15 of that Act the expenses of altering the position of any pipe for the supply of water or gas had to fall upon the company, and, moreover, under sub-s. 4 of s. 8, dealing with gas and water pipes, there is this specific provision: " The company shall pay all reasonable expenses to which such body may be put on account of such superintendence " which is one of the matters required under sub-s. 3 of s. 8, that there shall be superintendence. Were it not, therefore, for the provisions in the Act of 1878, the company—now the Postmaster-General—would continue to be liable for the expenses stated in s. 8 of the Act of 1863, but it is in terms provided that the enactment of the present section shall apply, and the enactment of the present section, as I have pointed out, by s. 7 puts the expense upon the persons incurring the work. Now what Mr. Tyldesley Jones says, and I think the argument is a very persuasive one, is that this provision dealing specifically with the expense of altering the position of telegraph lines in a particular way, leaving other expenses incurred untouched, points to the generality of this legislation, and does not deal with any specific provision in a particular Act as such. He also pointed out that the definition of an " Act of Parliament " in s. 2 of the 1878 Act means " any Act of Parliament whether public general, local and personal, or private," and that indicates again the generality of the provision.

I have come to the conclusion, therefore, without any doubt that on this point Mr. Tyldesley Jones is right, and that if he can point to any enactment which contains provisions for doing the work proposed to be done in the execution of an undertaking authorized by Act of Parliament, he is entitled to say he is outside the ambit of s. 7 of the Act of 1878. Now the Act on which he relies, as I have said, is s. 15 of the Telegraph Act, 1863, and the whole case to my mind resolves itself into this question, whether he can or cannot bring himself within the ambit of that section. If he cannot, he comes within the provisions of s. 7 of the later Act, for want of finding any specific enactment to take him out of it. The difficulty which I have felt in this case is as follows: This section, in my opinion, contemplated at the time of its passing that the body having the control of the street or public road would, in its capacity as such a body, in most cases resolve to alter the line or level if such resolution was to be made at all; that is to say, it would so resolve as being the highway authority. Mr. Tyldesley Jones points out that the powers of a highway authority to alter the line or level of a street are entirely statutory. With regard to the power of widening it is not necessary to go back to the earlier Acts of the eighteenth century; it is sufficient to say that by the Highway Act of 1835 specific powers were given to highway authorities to widen highways and also with regard to the alteration of the level of highways. Therefore at the time of the passing of the Act of 1863 specific power had been given to alter the level of highways, and therefore the powers which existed in 1863 were statutory powers.

In the present case, as I have already said, in my view of the finding in the case the powers which had to be executed were not executed by the highway authority under its highway powers at all. They could, on the finding in the case, have executed them under the Highway Act, but as I read the finding they have not done so. They have done it in pursuance of their powers under the Housing, Town Planning, etc., Acts, but nevertheless the Corporation of Birmingham is the highway authority for all purposes in Birmingham. As I indicated in the course of the argument, in the case of a non-county borough difficulties might arise which do not arise in this case. In the case of a non-county borough by the operation of Part III. of the Local Government Act of 1929, particularly s. 31, the County Council are the authority with respect to classified roads. A classified road means a road classified by the Minister of Transport under s. 17, sub-s. 2, of the Ministry of Transport Act, 1919, and may include a road in a non-county borough, which non-county borough nevertheless may be a local authority under the Housing, Town Planning, etc., Acts, for the purpose of altering the highway under the general provisions of those Acts. Therefore it may be that in certain cases difficulties might arise which may have hereafter to be considered; whether in such a case it can properly be said that the non-county borough, in so far as it is dealing under its housing and town planning powers with a road of which the County Council are the highway authority and might therefore, in my view, be said to be the body having control of the street, is within the ambit of s. 15 of the Act of 1863 at all. In such a case it may be that the point may have to be considered hereafter. It may be that a telegraph pole which is moved in a street which does come within the control of the non-county borough falls within s. 15 with consequent expense to the Postmaster-General, and a telegraph pole moved in a street which is not under the control of the non-county borough may have to be paid for under the later Act by the Corporation. I do not think in this case it is necessary to consider that problem. It may well be that the Ministry of Health, who are the central authority under both Acts, may make provision when housing and town planning schemes are to be undertaken by non-county boroughs, that they shall not have the power to deal with highways which are not under their control without the concurrence of the County Council.

However all that may be, I have come to the conclusion that in so far as the Birmingham Corporation is in any view a body having the control of the street, and as it has resolved to alter the line of the street, it does not matter for the present purpose whether they acted under the Housing, Town Planning, etc., Acts, or whether they acted under the Highway Act. I think the finding that they can act under the Highway Act if they wish to do so is an important one, and may distinguish such a case from the case of a non-county borough, an urban district council or a rural authority exercising power under the Housing, Town Planning, etc., Acts, though the case of the rural authority could scarcely now arise because they for the most part have no control over roads at all under the 1929 Act. However that may be, I think the Birmingham Corporation in this case satisfy the conditions of s. 15. They are the body having the control of the street; they have resolved to alter the line or level of the street under their statutory powers and obligations under the Housing, Town Planning Schemes, and being, therefore, a body which is so authorized, they can, in my view, exclude themselves from the provisions of the statute of 1878. They fall within s. 15 of the earlier Act of 1863, and in consequence I think that the case must be answered in favour of the defendants, and that they are entitled to call upon the Postmaster-General to pay the expenses of the alteration to these telegraph lines.

The appeal, therefore, will be dismissed.

ROCHE L.J. I agree in thinking that the judgment of Goddard J. is right, and that this appeal should be dismissed. My Lord has stated the facts and relevant enactments so fully that it is unnecessary for me to do more than to express compendiously my grounds for agreeing with his conclusion.

The matter presents itself to me as follows: The effect of the Telegraph Act, 1863, is in substance this: it gave the company, whose successor is the Postmaster-General, power under certain conditions to construct works in or under roads or streets, and it provided that if the line or level of the roads or streets had to be altered the owners of the telegraph lines should make any consequential removal or replacement of their works at their own expense. The Act of 1878 would enable the Postmaster-General to recover the sums in question unless the Act of 1863 applies to make them payable by himself as owner of the telegraphs. In my opinion the Act of 1863 does apply, and I am unable to accept the ingenious argument that the word " enactment " in s. 7 of the Act of 1878 refers to special or ad hoc enactments dealing with specific works and does not refer to general enactments such as the Act of 1863. No such limitation upon the word " enactment " is expressed, and in my judgment none can or should be implied. On the contrary I regard the observations of Mr. Tyldesley Jones in reference to the matter of water and gas pipes as very weighty. The Act of 1878 (see s. 7 ad finem) expressly dealt with provisions of the earlier Act of 1863 with reference to gas and water pipes, by way of variation or exclusion. If it had been intended to vary or exclude from operation the provisions of the earlier Act with reference to the expense of removing and replacing telegraphic lines where the line or level of a street or road has been altered by the body having the control of the street or road, one would certainly have expected similar express language to have been employed. In reference to the capacity in which the Corporation altered the line or level of these streets, a body having the control of a street or road requires statutory authority to alter the line or level of any street or road. That authority may be derived from a general or special Act. In the present case the authority came from the Housing and Town Planning Acts and the schemes made thereunder. In my judgment the resolve of the Corporation to alter the line and level of the streets was the resolve of a body which had the control of those streets, none the less because the resolve was due to and was justified by the Housing and Town Planning Acts and the schemes made thereunder.

For these reasons in my opinion the appeal should be dismissed with costs.

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SWIFT J. I agree and I do not wish to add anything to the reasons which have been given by my Lords, or the result at which the Court has arrived.

Appeal dismissed.

Solicitor for appellant: *Solicitor to Post Office.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Town Clerk, Birmingham.*

R. F. S.

SLATER *v.* SPREAG.

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July 30, 31.

(1935. S. No. 565).

Damages—Negligence—Death of injured person—Action for damages by administratrix—Deceased unconscious from time of accident until death—Claim in respect of physical pain suffered by deceased—Claim in respect of shortened expectation of life—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *ss.* 1, 2*—Law Reform (Miscellaneous Provisions) Act,* 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 1; *s.* 2, *sub-s.* 3.

A motor car negligently driven by the defendant, struck a man who was at once rendered unconscious and died two days later without having recovered consciousness. The administratrix of the deceased brought an action against the defendant under (inter alia) the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, alleging that causes of action against the defendant had vested in the deceased and survived for the benefit of his estate for damages in respect of pain and suffering caused to him by his physical injuries and by apprehension of shortening of his life, and claiming damages for his estate in respect of these causes of action:

Held, that the deceased having been unconscious and incapable of experiencing physical or mental pain from the time of the accident until his death, no cause of action in respect thereof had vested in him or survived for the benefit of his estate; but

Semble, that, if after the accident the deceased had for a time been conscious and endured such pain and suffering, the plaintiff could have recovered damages in respect thereof in so far as it arose from his physical injuries, and possibly also in so far as it arose from his anticipation of a shortening of his life.

Flint v. *Lovell* [1935] 1 K. B. 354, considered (1).

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(1) See now *Rose* v. *Ford,* Oct. 14, 1935, C. A., p. 90 post.

ACTION tried by MacKinnon J. without a jury.

On Saturday, December 22, 1934, at 1.30 P.M., Mr. Frank Slater was riding on a bicycle along the Great North Road near Woolmer Green towards Welwyn, Herts, when a collision took place between his bicycle and a motor car driven by Mr. Walter Charles Spreag, as a result of which Mr. Slater sustained a fractured skull and other injuries.

On Monday, December 24, 1934, at 1.35 A.M., at the Queen Victoria Hospital, Welwyn, to which he had been removed, Mr. Slater died in consequence of his injuries.

The deceased was a chimney sweep and gardener and was earning on an average 5*l.* a week. He was 44 years of age at the time of his death, and he left a widow and nine children.

On May 15, 1935, the deceased's widow, Mrs. Nellie Mary Slater, hereinafter called the plaintiff, as administratrix of the deceased, brought the present action against Mr. Spreag, hereinafter called the defendant, alleging (inter alia) that the death and injuries of the deceased were caused by the negligent driving by the defendant of his motor car; and claiming (i.) for the benefit of herself and the children of the deceased damages under the Fatal Accidents Act, 1846 (Lord Campbell's Act), for probable pecuniary loss, and (ii.) for the benefit of the estate of the deceased damages under the Law Reform (Miscellaneous Provisions) Act, 1934 (1) for (inter alia) (i.) pain and suffering endured by the deceased as a result of the accident, (ii.) the shortened expectation, and/or loss of life of the deceased occasioned by the negligence of the defendant, and (iii.) loss of earning capacity.

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(1) The Law Reform (Miscellaneous Provisions) Act, 1934, provides :—

Sect. 1 : "(1.) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. . . .

"(2.) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person :— . . . .

(*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

"(5.) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908. . . . ."

The defendant in his defence stated that he denied the alleged negligence, that he denied the alleged loss and damage, and that in any event the damages claimed under the Act of 1934 were not in law recoverable.

At the trial the defendant admitted negligence and the only issue was as to the amount of the damages. Evidence was given by a registered medical practitioner, who stated that he was called to see the deceased on December 22, 1934, about 2 P.M., when he was unconscious; that he was suffering from a fracture of the base of the skull and other injuries; that he had lost consciousness at once and never recovered it before his death, which took place on December 24, 1934, at 1.35 A.M.; and that his death was due to the fracture of the skull and cerebral hæmorrhage.

Edward Terrell (*O'Connor K.C.* with him), for the plaintiff. The plaintiff should be granted relief on both her grounds of claim. First, she is entitled under the Fatal Accidents Act, 1846, as administratrix of the deceased, to recover against the defendant, for the benefit of herself and the children of the deceased, damages for the injury resulting to her and to them from the negligence of the defendant, in causing the death of the deceased. By virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 2, sub-s. 3 (1), she is now also entitled to recover in a claim under the Act of 1846 the amount of the expenses of the deceased's funeral. Secondly, in addition to these damages the plaintiff is entitled, under that Act of 1934, s. 1 (1), as administratrix, to recover from the defendant for the benefit of the estate of the

(1) [See note (1), ante, p. 84.]

Sect. 2: "(3.) In an action brought under the Fatal Accidents Acts, 1846 to 1908, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought."

deceased, damages in respect of all causes of action against the defendant which were vested in the deceased at the time of his death and survive for the benefit of his estate. As the deceased lived for some time after the accident, it was possible for a cause of action arising out of it to vest in him, which on his death would survive for the benefit of his estate. Causes of action against the defendant did in fact vest in the deceased and survive for the benefit of his estate in respect of (i) pain and suffering caused to him by the accident, (ii) shortened expectation of life: see *Flint* v. *Lovell* (1), and (iii) loss of earning capacity. It is admitted that, if damages which would come under that third head be awarded under the Act of 1846, they cannot also be recovered under the Act of 1934. In any case the plaintiff is, however, entitled to recover damages under both the first and second of these heads.

Russell Vick K.C. and *Montague Berryman* for the defendant.

The plaintiff is not entitled to succeed in her claim under the Law Reform (Miscellaneous Provisions) Act, 1934. Assuming that the deceased had remained conscious for a time after the accident and that causes of action for damages had vested in him for pain and suffering and shortened expectation of life, the plaintiff cannot maintain an action for these damages. What passes under the Act to the personal representative of the deceased is a cause of action only and not a right to assessed damages. The damages which might have been awarded to the deceased against the defendant for pain and suffering, physical or mental, cannot after his death be assessed in an action brought by another person. The damages to which an individual is entitled for personal injuries can only be properly assessed while he is still alive. In *Flint* v. *Lovell* (2), damages for shortened expectation of life were awarded in an action brought by the injured man himself, and that case is no authority for awarding such damages in an action brought after a man's death by his personal representative. In the present case, however, as the evidence shows that the deceased was never conscious after the accident, no cause of action for

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pain and suffering ever in fact vested in him which could be transmitted to the plaintiff.

MACKINNON J. [having stated the facts continued :] This action is brought by the deceased man's widow, who makes a claim for compensation under the Fatal Accidents Act, 1846, and also a claim for damages under the Law Reform (Miscellaneous Provisions) Act, 1934. These claims are essentially different. The former is made for the benefit of the dependants of the deceased. The latter is made in order to get in the assets for the benefit of the estate of the deceased, and if he had made a will any money recovered would be dealt with according to that will.

It is provided by s. 1, sub-s. 5, of the Act of 1934, that the rights conferred by that Act shall be in addition to and not in derogation of any rights conferred by the Fatal Accidents Acts. Therefore, where a double claim, like that now before me, is made, the correct procedure would seem to be in the first place to disregard the Act of 1934, and to assess the damages under the Act of 1846 alone ; and, after that has been done, to consider questions under the Act of 1934 separately.

As to the claim under the Act of 1846, having regard to the earnings of the deceased and the position of his dependants, I assess damages under that head of claim at 1850*l.*, and I award a sum of 17*l.* for funeral expenses under s. 2, sub-s. 3, of the Act of 1934, which provides that in an action under the Fatal Accidents Acts damages may be awarded in respect of such expenses.

As to the claim under the Act of 1934, counsel for the plaintiff says that just before the deceased man died there was vested in him a cause of action for damages against the defendant. Those damages fell under two heads—namely, (i) pain and suffering, endured by the deceased, and (ii) the shortening of his expectation of life. There was a pleaded claim under a third head—namely, the loss of future earnings. I should have been of opinion that that head was excluded by s. 1, sub-s. 2 (*c*), of the Act of 1934, but I do not discuss it in detail, as counsel for the plaintiff has stated that he now makes no claim for damages under that head.

There remain the two claims for pain and suffering and for the shortened expectation of life. The latter is based on the decision of the Court of Appeal in *Flint* v. *Lovell* (1), which introduces some novel considerations into the law as regards damages. The question which has been debated is whether a claim under either of those heads can ever be a cause of action which under the Act of 1934 survives for the benefit of the estate. I think it can. Take the case, which I suggested during the argument, of a man lingering in hospital for six months, and during that period incurring medical expenses, losing wages, and suffering pain. He then dies, and at the time of his death there is vested in him a claim for damages in respect of each of those three matters. It is vested in him when he is alive, and when he dies it survives for the benefit of his estate. It has been said on behalf of the defendant that the fact that a man suffered pain cannot be proved after his death. It might be proved in a proper case equally well by observers as by the man himself, and I think that contention fails. In theory at any rate the plaintiff would therefore be entitled to damages for the pain and suffering undergone by the deceased before death. On the facts, however, I am not satisfied that he did experience any pain or suffering. The doctor said that he lost consciousness at once and did not recover it before death. A witness who saw the accident suggested that the deceased tried to raise himself and that he moaned, but the movement may have been convulsive and was certainly momentary. In these circumstances the degree of pain which the deceased suffered must be a matter of pure speculation. I am not satisfied that he suffered any pain for which more than nominal damages could be awarded. In order that the Court might act, it would have to be proved that he suffered, and that the plaintiff has failed to do.

With regard to the other head of claim, I am not sure that I appreciate the full purport of *Flint* v. *Lovell* (1), but, as

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I do understand it, the damages in that case were awarded for the subjective effect upon the plaintiff, from his knowing that his expectation of life was shortened. If a man does not retain consciousness, I do not think that any damages for the shortening of life can be awarded. Those damages are for the effect on his own mind of his knowledge that instead of being a healthy man he is a crippled wreck. It is the fact that he is so mentally distressed that is the ground for the compensation. Where, therefore, he at once loses consciousness, there is not vested in him at the time of his death any claim for damages in respect of the shortening of his expectation of life. On different facts the result might be different, for pain and suffering during a period of lingering might well be increased by the knowledge that the expectation of life was shortened.

In the result, the damages must be confined to those recoverable under the Fatal Accidents Act, 1846, together with the amount of the funeral expenses, and there will be judgment for the plaintiff for 1867*l*.

Judgment accordingly.

Solicitors for plaintiff: *Herbert Z. Deane & Co.*
Solicitors for defendant: *Berrymans.*

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[1934. R. 2938.]

Damages—Negligence—Death of injured person—Claim by administrator for benefit of estate of deceased person—Claim in respect of pain and suffering—Claim for loss of leg—Claim in respect of diminution of expectation of life—Whether cause of action vested in deceased and survived—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1, *sub-ss.* 1, 2.

By the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, sub-s. 1: " On the death of any person after the commencement of this Act all causes of action . . . . vested in him shall survive . . . . for the benefit of, his estate."

By sub-s. 2: " Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person :— . . . . (*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death. . . . ."

Through the negligence of the defendant a young woman was severely injured in a motor-car collision on August 4, 1934, sustaining a compound fracture of her leg. On August 6 the leg was amputated, as gangrene had set in, and on August 8 she died as the result of her injuries, having been unconscious nearly all the four days. The plaintiff, the father of the deceased girl, brought an action against the defendant as her administrator claiming damages (inter alia) under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of her estate. The damages were claimed under three heads: first, in respect of pain and suffering; secondly, for the loss of the leg; and thirdly, for the diminution of the deceased girl's expectation of life. Humphreys J. held that the plaintiff as the administrator of the deceased was entitled to recover damages in respect of the claim for pain and suffering, but that such damages must be limited to the four days during which the deceased girl lived after the accident, and as she was unconscious during nearly all that time the damages would be nominal; but that the administrator was entitled to recover substantial damages for the loss of the leg, and he assessed the damages under those two heads at 500*l.* He, however, rejected the claim for damage for loss of a reasonable expectation of life, as there was no evidence of any mental suffering being caused to the deceased girl by reason of the shortening of life. Both plaintiff and defendant appealed:—

Held, (1.) that the plaintiff as administrator of the deceased was entitled to recover damages for the benefit of her estate in respect of the claim for pain and suffering, but that such damages must be limited to the four days during which the deceased lived after the accident, and the Court fixed those damages at 20*l.*;

(2.) that the deceased would have been entitled to only nominal damages in respect of the loss of her leg, as she only survived the amputation for two days, the Court fixing that amount in the sum of forty shillings, and the plaintiff, as administrator of the deceased, was entitled to recover that amount for the benefit of her estate;

(3.) that the claim for damages allowed in *Flint* v. *Lovell* [1935] 1 K. B. 354 for the loss of a reasonable expectation of life was not founded on the mental suffering caused to the plaintiff by the shortening of his expectation of life.

(4.) Per Slesser and Greene L.JJ., that the plaintiff as the administrator of the deceased was not entitled to claim damages for the diminution of her expectation of life, inasmuch as that would be to complain in a civil court of the death of a human being as an injury; alternatively, per Slesser L.J., the awarding of damages under this head would amount to awarding damages in respect of the felony of causing her death if the conditions of criminal culpability laid down in *Rex* v. *Bateman* (1925) 41 Times L. R. 557 were satisfied.

Flint v. *Lovell* should not be extended beyond the actual decision—namely, that a living person may recover damages for the shortening of his expectation of life by a wrongful act of the defendant.

Per Greer L.J. (dissenting), that the deceased acquired a cause of action for the diminution of her expectation of life which survived to her administrator under s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, and he assessed the damages in respect of the loss of expectation of life in the sum of 1000*l.*

APPEAL from a decision of Humphreys J.

On August 4, 1934, a young woman, 23 years of age, named Mabel Alice Rose, was riding as a passenger in a motor-cycle combination between Cheltenham and Evesham, when a collision occurred between the motor-cycle combination and a motor-car driven by the defendant, Bernard Joseph Ford, through the negligence of the defendant. In consequence of the accident Miss Rose was severely injured, sustaining a compound fracture of her right leg and thigh. On August 6, gangrene set in and it became necessary to amputate the leg, but the infection had already spread above the point of severance, and on August 8 Miss Rose died as a result of her injuries, having been unconscious the greater part of the four days she had lived since the accident.

The plaintiff, Alfred Rose, who was the father of the deceased girl, brought an action against the defendant, as her administrator, and claimed damages both under the Fatal Accidents Acts, 1846 to 1908, for her dependants, and under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of her estate.

The claim of the plaintiff for damages under the statute of 1934 was put under three heads: first, as a claim for the damages which the deceased could have recovered, if she had lived, for pain and suffering; secondly, as a claim for damages for the loss of her leg; and thirdly, as a claim for the damages that she could have recovered on the principle decided in *Flint* v. *Lovell* (1) for the probability that her life would be shortened by reason of the injuries she had received.

Humphreys J. assessed the damages as regards the claim under the Fatal Accidents Acts, as to which liability was admitted, at 300*l*. As regards the claim for damages under the Act of 1934, he held that the administrator of the deceased was entitled to recover damages for the benefit of her estate in respect of the claim for pain and suffering, but that such damages must be limited to the four days during which she lived after the accident. No doubt she had suffered pain, but she was unconscious for a substantial part of the time, and if that were all he thought that the damages would have been quite small. But she had lost a leg, and as soon as her leg was amputated she had a right of action for damages against the defendant for the loss of a limb, which was a permanent loss. The loss of a limb had always been regarded as a great deprivation and a ground for giving substantial damages. The damages that he awarded, and the sum included the pain and suffering for the four days, was 500*l*. He rejected the third ground of claim for damage for loss of a reasonable expectation of life, because there was no evidence at all of any mental suffering being caused to the girl by reason of the shortening of her expectation of life, which he thought was the basis of the decision in *Flint* v. *Lovell*. (1)

There was no appeal as to the amount of damages awarded to the plaintiff under the Fatal Accidents Acts.

The defendant appealed on the ground that the judge was

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wrong in allowing anything for pain and suffering and for the loss of the leg.

The plaintiff cross-appealed against the decision of the judge disallowing the claim for damages for the diminution of the deceased girl's expectation of life.

It was agreed that the Court should fix the amount of the damages in so far as it was necessary.

Sir William Jowitt K.C., *Croom-Johnson K.C.* and *Montague Berryman* for the defendant. This appeal is brought in order to obtain a decision as to the true construction of some of the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. The judge in the Court below held that the administrator of the deceased was entitled to recover damages for the benefit of her estate in respect of pain and suffering, but that such damages must be limited to the four days during which the deceased lived after the accident, and as she was unconscious during nearly all that time he thought the damages would be quite small: he however did not quantify them but included them in the 500*l.* which he gave for the loss of the leg. The Legislature can never have intended to give A. damages for the pain and suffering endured by B. The intention of the Legislature was to give compensation to the person who has endured the pain and suffering and not to give damages for the pain and suffering to the executor of the person who endured the pain and suffering for the benefit of that person's estate. Sect. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, (1) only makes the cause

(1) Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, sub-s. 1: "Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate . . . ."

Sub-s. 2: "Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:— . . . . (*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included."

Sub-s. 5: "The rights conferred

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of action survive, but it does not follow because the cause of action survives that the measure of damages would be the same where the action was brought by the executor for the benefit of the deceased person's estate as it would be if the action were brought by the person who had endured the pain and suffering. The judge was also wrong in assuming that the loss of her leg was a permanent loss to the deceased girl and would entitle her to recover substantial damages, which right survived to her administrator. It does not follow because the loss of a leg in the case of a man who goes on living is a permanent loss, in which case the damages awarded would be substantial, that the same amount would be awarded to a person who only lived two days after he lost his leg. The measure of damages would be quite different in the two cases owing to death intervening in the one case. The loss of a leg to a dying person is a matter of no importance. Under sub-s. 2 of s. 1 of the Act of 1934, the damages awarded are to be for the benefit of the estate of the deceased person, and are not to include exemplary damages. Para. (*c*) of sub-s. 2 expressly provides that where the death of the person has been caused by the act or omission which gave rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent upon his death except a sum for funeral expenses. A claim for damages for premature death is a claim for loss to the estate of the deceased person consequent on his death, and is therefore excluded by the section. The claim for damages for the shortening of the normal expectation of the deceased's life was based upon the decision in *Flint* v. *Lovell* (1), but in that case the action was brought by the person whose life had been materially shortened and not by his executors or administrators on behalf of his estate. That case has been considered in several recent cases. Macnaghten J. in *Davies* v. *Russell*, tried at the

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by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908, or the Carriage by Air Act, 1932 . . . ."

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Stafford Assizes on July 3, 1935, held that the administrator of a deceased person could not recover damages for the pain and suffering the deceased endured, including the pain and suffering caused by reason of the fact that his expectation of life had been shortened, because the fact of the death having taken place before the damages were assessed made it impossible for the administrator to recover anything under that head. Hawke J. in *Executors of Edie* (*dec.*) v. *Short*, tried at the Hampshire Assizes on July 15, 1935, considered that on the principle of *Flint* v. *Lovell* (1) he had to give something for the pain and suffering the deceased went through by reason of the loss of expectation of life. MacKinnon J. in *Slater* v. *Spreag* (2) considered that the claim for damages in *Flint* v. *Lovell* (1) was " in respect of the subjective effect of the shortening of life, namely, the consciousness of the man that his life is shortened and the added mental disquiet and loss of happiness which results from that consciousness," and he held in that case that as the deceased man was unconscious from the time of the accident until his death there was no claim for damages in respect of the shortening of the expectation of life vested in him before his death which could survive for the benefit of his estate. MacKinnon J. in that case expressed a view that a claim for pain and suffering was a cause of action which could survive, within the meaning of s. 1, sub-s. 1, of the Act of 1934, for the benefit of the estate of the deceased person. The damages awarded for the shortening of the expectation of life were for the subjective effect upon the person injured of the knowledge that his expectation of life was shortened. If the person injured was unconscious from the time of the accident until death supervened no claim for damages for the shortening of his expectation of life vested in him before his death, and no such claim could survive for the benefit of his estate.

[*Armsworth* v. *South Eastern Ry. Co.* (3) and *M'Master* v. *Caledonian Ry. Co.* (4) were also cited.]

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(1) [1925] 1 K. B. 354.
(2) [1935] W. N. 159.
(3) (1847) 11 Jurist, 758.
(4) (1885) 13 Rettie, 252; 23 Sc. L. R. 181.

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Arthur S. Ward for the plaintiff. The judgment of Humphreys J. awarding 500*l.* in respect of the claim for loss of leg and pain and suffering was correct. His judgment with regard to the claim for damages for shortening of the expectation of life is not in accordance with the law as laid down in *Flint* v. *Lovell* (1) and should be reversed. The argument put forward on behalf of the defendant, if acceded to, would have the effect of wiping out s. 1 of the Act of 1934 and would set free wrong-doers from liability for the wrongs they have committed. It has always been said that it is cheaper to kill a person rather than to maim him. The Court must have regard to the cause of action vested in the deceased prior to her death, and must award damages as if they had been assessed prior to death. Sect. 1 of the Act of 1934 should be construed as if it provided that all causes of action vested in him prior to his death shall survive for the benefit of his estate. The cause of action which vested in the deceased girl prior to her death due to the negligence of the defendant was in respect of her pain and suffering; her loss of a leg; and her loss of the normal expectation of life. That cause of action was vested in her at her death and survived to her administrator on her death, and the administrator was entitled to ask the Court to award damages under each head of claim. The Court was entitled to award damages for the loss of the leg notwithstanding that the girl who lost her leg had since died. Her death was not due to the loss of her leg but to the fact that gangrene had set in. The cause of action which survived on her death to her administrator for the benefit of her estate included all the damages which the deceased girl herself could have recovered. She could on August 7, after the amputation of her leg and before her death, have commenced an action to recover damages for the shortening of her expectation of life. That cause of action survived to her administrator. The limitation as to the damages that can be recovered under Lord Campbell's Act is set out in the Act itself. Where it is intended that the damages under the Act of 1934 shall be limited the limitation is duly set out in the statute and there is no limitation with regard to damages

(1) [1935] 1 K.B. 354.

claimed for diminution of the expectation of life. The amount of damages awarded for the diminution of the expectation of life ought to be in inverse proportion to the age of the person injured, the younger the person the greater ought to be the amount of damages awarded. The death of the person injured ought to be ignored in assessing damages for pain and suffering and for the loss of the leg. The damages for pain and suffering ought not to be limited to the four days she lived after the accident. Damages ought to be awarded as if they were assessed in her lifetime and then passed to her administrator.

Croom-Johnson K.C. replied.

Cur. adv. vult

1935. Oct. 14. The following written judgments were read :—

Greer L.J. This appeal raises an important question on the construction and application to the facts proved in the case of s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934.

The facts may be quite shortly stated. On August 4, 1934, the plaintiff's daughter, Mabel Alice Rose, was injured in a motor-car accident by the negligence of the defendant. She received two bad fractures of the right leg, which was crushed. She was taken to hospital, but it was found on August 6 that gangrene had set in in the injured limb. The limb was then operated upon and the leg removed, but unfortunately the infection had spread above the point of severance, and on August 8 the girl died as the result of the gangrene following upon her injuries. It was admitted that the defendant was liable for such damages as could be recovered either under the Fatal Accidents Acts, or under the Act of 1934 above mentioned. No question arises in the appeal with reference to the amount of 300*l.* which was awarded to the dependants of the deceased—the plaintiff and his wife. The plaintiff, however, also claims, as administrator of the estate of his daughter, damages under the statute of 1934 above mentioned, and his counsel, in claiming these damages on his behalf, claims them under three heads: First, as damages which the deceased could have recovered, if she had lived, for pain and suffering; secondly, as damages for the loss of her leg; and, thirdly, as damages which, it was contended, she could have recovered on the principle decided in the case of *Flint* v. *Lovell* (1) for the probability, which, by the time the case was heard, had become a certainty, that her life would be shortened by reason of the injuries she had received.

Before referring in detail to the words in the statute I will state my view as to the meaning of the statute and its application to the facts of this case. In my judgment the object of the statute, as appears from its wording, was to put a defendant who, by his negligence, had caused the death of a man or woman in the same position as regards liability as he would have been if the injured person had survived for a time sufficient to enable the damages to be assessed and converted into a judgment debt which, if not paid, would enure for the benefit of the estate. Until Lord Campbell's Act was passed the principle "Actio personalis moritur cum persona" prevented those who were injured by the death of a relation on whom they were dependent from bringing any action to recover damages. That Act provided that the dependants of a person killed by the wrongful act of a defendant could recover for the pecuniary injury they had sustained by reason of the death, provided the facts showed that the deceased person, if he had lived, would have had a good cause of action against the defendant; but this remedy fell far short of giving to the dependants or to the estate of the deceased the same cause of action which had vested in the deceased before the death. This was considered by many to bring about an injustice which limited the liability of a wrong-doer, who had by his wrong-doing killed another person, to something very much less than his liability would have been if he had only maimed the injured person.

Sect. 1 of the Act of 1934 made a very considerable alteration in the law by stating that all causes of action

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subsisting at the death vested in the deceased should survive for the benefit of the estate. This necessarily means: should survive to be enforced on behalf of the estate by the personal representative of the deceased. This survival of the cause of action is said to be subject to the provisions of the section, with some of which I will deal presently; but apart from the other provisions of the section it seems to me clear that what does survive and becomes enforceable by the personal representative of the deceased is the cause of action as it subsisted at the date of the death in the deceased person. The cause of action in negligence is not complete merely by proving negligence; the cause of action is in respect of the damages caused by that negligence, and I think it is beyond dispute, apart from what I have to say about the other parts of the section, that the personal representative can recover the damages which could have been recovered by the deceased and which were a liability on the wrong-doer at the date of the death.

It is to be observed that the cause of action vested in the deceased was not her death, nor had she a separate cause of action for each item of damage. The cause of action was negligence causing damage, and it seems clear to me that all items of damage suffered by her are recoverable by her administrator by reason of the survival of the cause of action, now vested in the plaintiff as her administrator. I do not understand how it is possible to draw any distinction between the several items of damage which the deceased could have claimed if she had lived. In order to recover any item of damage the plaintiff was bound to prove as part of his case the death of the deceased. If the old rule of law which prevented any one from relying on the death of another as a cause of action or giving a right to damages were unaffected by the statute, the plaintiff would be unable to recover anything.

In the present case the learned judge, with some hesitation, awarded the plaintiff 500*l.*, which included damages for pain and suffering, and damages for the loss of the deceased's leg. The damages for pain and suffering were necessarily confined to the four days during which the deceased lived. The learned judge did not specially quantify them, but included them in the 500*l.* that he awarded both for pain and suffering and for loss of the limb. To avoid another trial, the parties have agreed that in so far as it is necessary this Court shall quantify the damages attributable to pain and suffering, and this we do at the sum of 20*l.*

With regard to the damages for the loss of her leg: upon the true facts, which must have been known to the medical advisers of the deceased, on the day of her death she had in fact only lost her leg for two days, and it is impossible to say that 480*l.* is a proper amount to award under this head. The learned judge seems to have estimated the damages not with reference to time during which in fact the poor girl had lost her leg, but upon the assumption that she would have lived as a one-legged woman for the rest of her natural life. In this, we think the learned judge was wrong. The defendant, as we were told, acting through his insurance company, appealed on the ground that the judge was wrong in allowing anything for pain and suffering, and wrong in allowing anything for the loss of the leg. We think that the deceased would have been entitled to something in respect of the loss of her leg for two days in addition to her pain and suffering, but this cannot be more than a nominal amount, and we fix it at forty shillings.

The more important matter is that which was raised by the cross-appeal. The learned judge disallowed the claim for the shortening of the life of the deceased which it was contended her administrator was entitled to make because at or before the time of her death the deceased could have made it an item in her claim for damages in accordance with the decision of Acton J. and the Court of Appeal in *Flint* v. *Lovell.* (1) Assuming, as I must for the present, that that case was rightly decided, I think the element of damage by reason of the deceased, who was a healthy woman, having been deprived of the opportunities of working and enjoying the normal period of life was included in the damages which she

(1) [1935] 1 K. B. 354.

could have received as one of the consequences of the cause of action vested in her immediately before her death. Such damages are damages which the defendant would have had to pay in respect of the cause of action vested in the deceased at the time of her death. The right to them, in my judgment, survived to her personal representative by reason of the words of s. 1 of the Act of 1934.

But it was contended, first, that on the true construction of the decision in *Flint* v. *Lovell* (1), damages of the kind mentioned were merely part of the damages for pain and suffering caused by the contemplation by an injured person of the shortening of his or her life. We think that this is a misconception of the decision in *Flint* v. *Lovell* (1), and that what the majority of the Court there decided was that a plaintiff who brought his action and had it tried at a time when it appeared that his life would be shortened was entitled to damages for the certainty, or in any case the probability, that his life would be shortened and he would be deprived of the enjoyment of the normal period that he was entitled to expect. It was contended also that by reason of sub-s. 2 (*c*) of the Act of 1934 the plaintiff could not recover damages of this kind. I think this argument depends on a misconstruction of the sub-section. I think the sub-section means that you are entirely to disregard any loss or gain to the estate consequent upon the death, except in respect of funeral expenses, and, though the money in question if recovered will be a gain to the estate, it is obvious that sub-s. 1 shows that it was intended that the damages recoverable should be a gain to the estate, and the gain to the estate comes not by reason of the death, but by reason of the surviving of the cause of action which is enacted by sub-s. 1 of s. 1. The statute has, as was argued, the extraordinary result of bringing to the estate property which in fact had never become inheritable property. I think it was clearly intended by the statute that the damages should be paid by the wrong-doer to the estate, and that the estate should be in the same position as if an action had been

(1) [1935] 1 K. B. 354.

brought during the life of the deceased and the right to damages had been converted into a judgment debt.

For these reasons I think that the appeal of the defendant should be allowed by reducing the damages to 22*l.*—20*l.* for pain and suffering and 2*l.* for the loss of her leg for two days—and that the plaintiff should succeed on the cross-appeal; and as it is necessary and it has been agreed that the Court should fix the damages, I think the damages for the loss of the prospect of a normal continuance of life should be fixed at 1000*l.* It is, of course, impossible to award adequate compensation in these cases. As Parke B. said in *Armsworth* v. *South Eastern Ry. Co.* (1): "It would be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. . . . . Scarcely any sum could compensate a labouring man for the loss of a limb, yet you don't in such a case give him enough to maintain him for life." And in *Rowley* v. *London and North Western Ry. Co.* (2) Lord Esher, then Brett J., said that the only legal direction to the jury would have been: "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, *under all the circumstances, a fair compensation.*"

Directing myself on these principles, I think that the award in respect of the loss of expectation of life ought to be the sum of 1000*l.*

The defendant's counsel, who frankly stated that he was acting for one or more insurance companies who desired to have the questions involved in this case finally determined by the House of Lords, asked for leave to appeal. I think that under the circumstances both parties should have leave to appeal, but that the defendant's leave to appeal should be subject to the condition that as he desires to have the matter settled not merely for the present case but as a guide to the future, he should agree as a condition of leave, to pay the costs of the appeal to the House of Lords of both sides.

(1) 11 Jurist, 758, 760.

(2) (1873) L. R. 8 Ex. 221, 231.

As my brethren take a different view from mine with regard to the cross-appeal, the judgment of the Court will be as stated by them.

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SLESSER L.J. On August 4, 1934, the defendant negligently drove a motor-car into collision with a motor-cycle combination in which a Miss Mabel Rose was riding as a passenger. As a result of the accident she was very severely injured, sustaining a compound fracture of the right leg. On August 6, gangrene set in and it became necessary to amputate the leg, but the infection had already spread, and on August 8 Mabel Rose died as a result of her injuries.

The plaintiff, Alfred Rose, sues in this action as her administrator and claims damages both under the Fatal Accidents Acts for her dependants and under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of her estate.

As regards the claim under the Fatal Accidents Acts, the learned judge has found negligence and partial dependency, and awarded 300*l.* as provision for her parents. This part of the judgment is not subject to appeal, but in addition he has given judgment under the 1934 Act for a sum, in all, of 500*l.* This part of the judgment is appealed and there is also a cross-appeal by the plaintiff in respect of damages under a head of claim which the learned judge has refused to entertain.

The damages claimed by the plaintiff fall into three classes: first, a claim for damages in respect of pain and suffering; secondly, a claim in respect of the loss of the leg; and, thirdly, a claim for the shortening of reasonable expectation of life by the deceased girl. It is in respect of the first two claims that the judge awarded damages, it is in respect of the claim for damages for loss of expectation of life that he found for the defendant.

In so far as this woman died as the result of the accident before trial, no damages other than those awardable under Lord Campbell's Act could have been given before the passing of the Law Reform (Miscellaneous Provisions) Act, 1934, and it is therefore incumbent upon the plaintiff as administrator

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to bring himself within the compass of that Act if he is to succeed in respect of the estate. Sect. 1, sub-s. 1, of that Act provides that, subject to the provisions of the section, on the death of any person after the commencement of the Act, all causes of action vested in him shall survive for the benefit of his estate ; and by sub-s. 2 of the same section : " Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person :— . . . . (*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included."

To deal with the three heads of claim. As regards pain and suffering, which extended for four days from August 4 to August 8, the deceased at the time of the death had vested in her such damage as may properly be attributable to that matter. I think that the learned judge was right in limiting such damage to the four days when pain and suffering were actually suffered. He has not assessed this damage, but has included it in the 500*l.* in all which he has given, but he has indicated that the substantial damage is not for this suffering but for the loss of the leg, and he describes the damage for pain and suffering as quite small. As we have been asked to assess such damage here by both parties, in my opinion 20*l.* would be a sufficient sum, more especially having regard to the fact that the deceased, according to the doctor, throughout the four days was in a state of coma.

I pass next to the award of the remainder of the 500*l.*, say 480*l.* The learned judge appears to me to have applied a different principle in awarding damages for the loss of the leg from that which he applied in the case of the pain and suffering. He describes the latter as a permanent loss, but in so far as the lady died four days after the accident, I am unable to see that after August 8 there was any damage due to the loss of the leg which can be separately considered from the loss of life. During the four days the leg would in

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fact have been useless, as the deceased was not in a position to use it, and I think it would be improper to say that in such circumstances the damages for its loss were more than nominal.

I come now to the question of the cross-appeal, which is one of difficulty. Damage being of the gist of the action, this cause of action, which might have stood alone, must be separately maintainable. The reason which the learned judge assigns for refusing to entertain the claim for diminution of expectation of life does not appear to me to be supportable, for he says that he rejects it because, in his judgment, there was no evidence at all of any mental suffering being caused to the girl by the shortening of her expectation of life, which he thinks is the basis of the decision of this Court in the case of *Flint* v. *Lovell.* (1) In that case Acton J. gave damages to a plaintiff on the ground that, on the evidence, his life had been very materially shortened and that he was not expected to live very long—probably something under a year. The learned judge gave damages for suffering, but also and separately for the loss of " an enjoyable, vigorous and happy old age " and I am unable to find that this damage was given to the plaintiff, who was living at the date of the trial, by reason of any mental suffering caused by the contemplation by him of the coming end of his life, and, indeed, it is to my mind clear that neither Acton J. nor the majority of this Court proceeded upon any such assumption. Thus Greer L.J. (2), after speaking of the suffering of " mental disquietude through the prospect of an early death," goes on to say, disjunctively, " but also claims that what might have been an eight to ten years pleasant life in which he could have carried on his normal activities has been converted into a precarious tenure not likely to exceed twelve months." And I say (3) : " It was attempted in argument to say that this finding was no more than a finding that the mental pain and suffering of the plaintiff had been increased by the prospect of his early death. In my view, this interpretation is not possible. The learned judge clearly severs the question of the plaintiff's

(1) [1935] 1 K. B. 354. (2) Ibid. 359. (3) Ibid. 361.

suffering from the consideration of the loss of his prospect of life, for the learned judge states in addition to the physical disabilities and the suffering, the further ground for giving damages that the plaintiff's life has been shortened." It is also interesting to observe that the argument of Mr. Maurice Healy for the appellants proceeded on the basis (1) that "the shortening of a man's life cannot be taken into account at all as an independent head of damages; it can only be taken into account in assessing damages by reason of the increased suffering caused to the man by his knowledge of his impending death." And Mr. Richard O'Sullivan, for the respondents, in an argument which found favour with the majority of the Court, said (2): "A living person is complaining of the damage that he suffers by reason of the shortening of his life."

MacKinnon J. in the case of *Slater* v. *Spreag* (3) also appears to think that the claim for damages in *Flint* v. *Lovell* (4) was accepted "in respect of the subjective effect of the shortening of life, namely, the consciousness of the man that his life is shortened and the added mental disquiet and loss of happiness which results from that consciousness," and founds his decision for the defendant in *Slater's* case (3) on this matter on the basis of this mental disquiet, concluding on the evidence that on the facts of that case he was not satisfied the deceased had in fact suffered pain and suffering. MacKinnon J. in that case, and Humphreys J. in the present case, appear to assume a view of the ratio decidendi in *Flint* v. *Lovell* (4) which I cannot accept, and I think therefore, treating *Flint* v. *Lovell* (4) as authority, that a man may claim damages simpliciter for the shortening of his expectation of life, and that had the deceased been living at the time of the trial and thus had been able to bring the action in her own name, if she had been able to show by sufficient evidence that her expectation of life had been shortened she would have been in a position in a proper case to claim damages, relying upon the judgment of this Court in *Flint* v. *Lovell*. (4) But these are not the facts of the present case; Miss Rose was dead when the action was brought, and it is necessary here for the plaintiff to show that there was vested in the deceased at the time of her death a cause of action on this head which could survive for the benefit of her estate.

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(1) [1935] 1 K. B. 356.
(2) Ibid. 357.
(3) Ante p. 83.
(4) [1935] 1 K. B. 354.

Now it is clear to my mind that had the deceased been instantly killed on August 4 by the negligence of the defendant, no cause of action would have vested in her. The sole rights would have been under the Fatal Accidents Acts in her dependants. But it is argued by Mr. Ward that in so far as she survived for four days, and I suppose the same argument would apply to four minutes, that the right of action in regard to the curtailment of her expectation of life then vested and on her death survived for the benefit of her estate. To test this matter, it is necessary to ask what exactly was the damage sustained? Before the passing of the 1934 Act, her death would have put an end to such right of action as she possessed by reason of the "actio personalis" doctrine; that right now survives, but, nevertheless, I do not think it operates to extend the condition on which she would have otherwise have had to rely—namely, that she, a living person, still possessed an expectation of life which the accident had curtailed. The principle that the right of action is merged in the felony is unaffected by the 1934 Act. In other words, the mischief to which the Act was directed was the absence of any power in her representatives after death to maintain an action where such right of action but for death would have continued in the deceased. The question whether the deceased had or had not in fact on August 8, the date of the death, any expectation of life at all must be answered in the negative, for thereby the wrongful act of the defendant became a felony, and to award damages to the estate on this head would in fact be to award damages in respect of the felony of causing her death at any rate if the conditions of criminal culpability laid down in *Rex* v. *Bateman* (1) were satisfied

In *Admiralty Commissioners* v. *Owners of S.S. Amerika* (2) death had supervened, whereas in *Flint* v. *Lovell* (3) the plaintiff had not died, and, if the test be applied whether a third party

(1) 41 Times L. R. 557.
(2) [1917] A. C. 38.
(3) [1935] 1 K. B. 354.

could complain of loss caused by the necessity to pay moneys as the result of the shortening of the expectation of life of a deceased person, such as a servant, I think that the answer would be that such a case would, equally with a complaint of the death of the servant, fall within the principle of the *Amerika* case (1) and *Baker* v. *Bolton* (2) rather than the case of *Flint* v. *Lovell* (3), for the reason that on the death the felony became complete and the right of action became merged in the felony, as those cases decide. Whether it did or did not do so would depend on whether the degree of negligence constituted the killing manslaughter, an inquiry which I do not think the 1934 Act required the Court to make. If the better view be that the rule that in a civil court the death of a human being cannot be complained of as an injury (per Lord Sumner in the *Amerika* case (4)) the question of the application of *Rex* v. *Bateman* (5) to this case does not arise in any event. I do not think that *Flint* v. *Lovell* (3) should be extended beyond that which it actually decides—namely, that a living person may complain that as the result of the wrongful act of another his future expectation of life is less than it would otherwise have been.

For these reasons, which are other than those relied upon by the learned judge, I think that the damages should be reduced from 500*l.* to 22*l.* without costs of the appeal and that the cross-appeal fails with costs. As Greene L.J. is of the like opinion, the judgment of the Court will be as above stated. If I am wrong as to the cross-appeal, I think 1000*l.* would be the right damages in the cross-appeal.

GREENE L.J. The facts in this case have already been fully stated and I will confine my observations to the questions of law which arise. I respectfully agree with the views expressed by the other members of the Court with regard to two of the heads under which damages are claimed—namely, pain and suffering and the loss of the leg, and I do not desire to add anything to what has already been said.

(1) [1917] A. C. 38.
(2) (1808) 1 Camp. 493.
(3) [1935] 1 K. B. 354.
(4) [1917] A. C. 50.
(5) 41 Times L. R. 557.

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I accordingly pass to the third head under which damages are claimed—namely, damages for loss of Miss Rose's right to live or, as it was otherwise expressed, loss of her expectation of life. In view of the fact that there is a difference of opinion among the members of the Court I express my own views with considerable diffidence. The learned judge was of opinion that no damages could be awarded under this head. He considered that the basis of the decision of this Court in *Flint* v. *Lovell* (1) (on which the present claim is founded) was that the damages there in question were awarded in respect of the mental suffering caused to the plaintiff by the shortening of his expectation of life. I do not so read the judgments of the majority of the Court in that case (which is of course binding upon us), and I respectfully agree with the judgments already delivered with regard to that matter.

This leads me to what to my mind is the most difficult question in the case. The claim arises under sub-s. 1 of s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, and it is said that in view of the decision in *Flint* v. *Lovell* (1) the case must be treated on the footing that Miss Rose had, during the interval between the accident and her death, a right of action for damages for negligence, one head of which was the damage caused to her by the loss of her expectation of life, and that the right to claim damages under this head passed to the administrator of her estate by force of the sub-section. It is to be observed that in the case of *Flint* v. *Lovell* (1) the injured person was still alive and was the plaintiff in the action. This fact is emphasized in each of the majority judgments. Thus Greer L.J. says (2): " Having regard to the peculiar origin of the rule,"—i.e., that " any person who suffers damage by reason of the death of another occasioned by the wrongful act of a third party in respect of which the law would otherwise give him a cause of action, cannot rely on the death either for the purpose of proving a cause of action, or for the purpose of recovering damages for a cause of action which he proves independently of the death "— " I have come to the conclusion that it has no application to a

(1) [1935] 1 K. B. 354.

(2) Ibid. 359.

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case in which a plaintiff still living at the date of the trial is asking for damages." A similar view is expressed by Slesser L.J. (1) In my opinion the principle laid down in *Flint* v. *Lovell* (2) is to be confined to cases where the injured person is still alive at the date of the action. It appears to me to be no more possible to disregard the fact of death in the case of the claim for damages for loss of expectation of life than it is in the case of the loss of the leg. The substance of the claim on the facts of the present case is, in my opinion, a claim by an administrator for damages for loss of the deceased's life, and I do not think that it can be treated as a claim originally vested in a living person for damages for loss of expectation of life upon the principle of *Flint* v. *Lovell.* (2)

If I correctly appreciated Mr. Ward's clear and concise argument for the plaintiff, he based his case on *Flint* v. *Lovell* (2) and not upon the view that the plaintiff is entitled to claim damages for loss of the deceased's life as such. He admitted, as I think, in view of para. (*c*) of sub-s. 2 of s. 1, he was bound to admit, that he could not have claimed any higher damages if Miss Rose had been tenant for life of a valuable property. The loss of such a life interest would, I think, have been a "loss to her estate consequent on her death" within the meaning of para. (*c*), and must on any view be excluded in calculating the damages. The result of this appears to me to be that the claim is one for loss of life as a good in itself, irrespective of its financial advantages. I do not think that such a claim could be maintained as arising under a cause of action subsisting or vested in Miss Rose which by force of sub-s. 1 of s. 1 could survive for the benefit of her estate. Such a claim—which is not in fact the claim made—would in my view be negatived on the principle that in a civil court the death of a human being cannot be complained of as an injury, which was affirmed by the House of Lords in the *Amerika* case. (3) As I read the decision in that case the rule is of general application and is not limited to the case where a third person is suing such as a master

(1) [1935] 1 K. B. 365. (2) [1935] 1 K. B. 354.
(3) [1917] A. C. 38.

or a husband. Sub-s. 1 of s. 1 of the Act does not create new causes of action—it merely prevents existing causes of action from being extinguished by the death of the person in whom they were vested as had formerly been the case wherever the doctrine "actio personalis moritur cum persona" applied. In my opinion it would not be correct to say that Miss Rose had at the moment of her death any cause of action vested in her under which she could claim damages for her own death, and her administrator can be in no better position. If I am wrong in my opinion on this part of the case I agree that the sum of 1000*l.* would be the proper figure at which damages should be assessed.

Appeal allowed. Damages reduced to 22l.
Cross-appeal dismissed. (1)

Solicitors for plaintiff: *Vizard, Oldham, Crowder & Cash, for Cross, Son & Hodgetts, Evesham.*

Solicitors for defendant: *Berrymans.*

R. F. S.

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Oct. 17, 18;
Nov. 4.

Marriage—Promise made by married man—Promise made after decree nisi obtained by the wife but before decree absolute—Whether promise enforceable—Public policy.

In 1930 the plaintiff, a young woman, met the defendant, who was, to her knowledge, a married man. In 1932 sexual intercourse began to take place between them. On January 16, 1933, the defendant's wife obtained a decree nisi for the dissolution of her marriage with him. On February 21 and in April, 1933, the defendant promised to marry the plaintiff when his wife's decree should be made absolute. On July 31, 1933, the decree was made absolute, but the defendant refused to marry the plaintiff. The plaintiff brought an action against the defendant claiming damages for breach of promise of marriage:—

Held, by Slesser and Greene L.JJ. (Greer L.J. dissenting), that the promise of marriage which was made by the defendant, who to the knowledge of the plaintiff was married at the time the promise was made, was unenforceable as being against public policy, notwithstanding that the promise was made by a man against whom his wife had obtained a decree nisi for the dissolution of the marriage and in the interval between the granting of the decree nisi and the time when such decree was made absolute, inasmuch as the mere granting of the decree nisi did not put an end to the marriage.

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(1) On October 28 leave was granted to the plaintiff to appeal to the House of Lords. The defendant did not ask for leave to appeal.

Spiers v. *Hunt* [1908] 1 K. B. 720; *Wilson* v. *Carnley* [1908] 1 K. B. 729; *Skipp* v. *Kelly* (1926) 42 Times L. R. 258; *Noice* v. *Brown* (1876) 20 Am. Rep. 388, 23 Am. Rep. 213 applied.

Decision of Hawke J. [1935] 2 K. B. 334 affirmed.

APPEAL from a decision of Hawke J. upon a further consideration of an action tried with a special jury. (1)

The plaintiff, Emily Fender, claimed from the defendant, Sir Anthony St. John-Mildmay, damages for breach of promise of marriage.

At the trial it was proved that the plaintiff and the defendant, who was then married, met in 1930. In 1932, the defendant having told the plaintiff that he would marry her if and when his wife divorced him, sexual intercourse took place between them. Later in the same year Lady Mildmay, the defendant's wife, instituted divorce proceedings against him, alleging adultery between him and the plaintiff. On January 16, 1933, Lady Mildmay obtained a decree nisi dissolving her marriage with the defendant. On February 21, 1933, and in April, 1933, the defendant promised to marry the plaintiff when his wife's decree nisi was made absolute, and thereafter sexual intercourse took place between them. These were the promises relied upon by the plaintiff in support of her claim. Lady Mildmay's decree was made absolute on July 31, 1933. Subsequently the defendant refused to marry the plaintiff and in 1934 he married another woman.

The defendant at the trial admitted the promises and the breach of them and relied on the defence in law that, at the time of the promises, he, to the plaintiff's knowledge, was a married man and the promises were, therefore, illegal and void as against public policy.

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(1) [1935] 2 K. B. 334.

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The jury returned a verdict in favour of the plaintiff, assessing the damages at 2000*l.*, and the legal point raised in the defence was then argued.

Hawke J. held that the defendant, when he made the promises relied on by the plaintiff, was a married man and, notwithstanding the granting of the decree nisi, under full marital obligation to his wife, and, therefore, the promises were illegal and unenforceable as being against public policy. The promises were no less contrary to public policy as tending to the continuance of sexual relations which already existed than they would have been as tending to create those relations if not already established.

The plaintiff appealed.

J. P. Eddy and *D. W. O'Connor* for the appellant.

Schiller K.C. and *P. B. Morle* for the respondent.

The arguments were in substance a repetition of the arguments in the Court below, and are sufficiently indicated in the judgments.

Cur. adv. vult.

1935. Nov. 4. The following judgments were read:—

GREER L.J. This is an appeal by the plaintiff against a judgment for the defendant in a breach of promise action. She complains that the learned trial judge wrongly decided that she was not entitled to recover on the ground that her contract was void as being against public policy.

The appellant, who was a State registered nurse, first became acquainted with the respondent when, in August, 1930, she was called upon to nurse him in a Nursing Home. He told the appellant that he was unhappy with his wife, and after two or three days, said he had fallen in love with her. The appellant ridiculed the idea; and when the respondent left the Nursing Home, they parted merely as friends. The respondent is a baronet living at a place called Dogmersfield Park, and apparently a man of position and substance. After he left the Home, he came to see her

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frequently; and wrote her a great number of letters. Nothing important happened until January, 1932, when the respondent took the appellant with another nurse for a holiday in Wales. He then told her he could not go on living with his wife; and asked her if she would marry him, if he could get a divorce, after decree absolute. She replied in the affirmative; and thereafter sexual relations took place between them. When they returned from Wales, he said his wife refused to divorce him. The parties continued to have occasional illicit intercourse. On one occasion she told him that unless there was some prospect of marriage, she could not carry on as his mistress, and that they must not meet. He then said he would ask his wife once more whether she would divorce him. Later he said his wife said she would divorce him. He again said he was very much in love with the appellant, and would marry her if a decree absolute was obtained. At this time proceedings for divorce had not been started; but on September 12, 1932, the respondent's wife petitioned for divorce on the ground of her husband's adultery with the appellant. Thereafter on many occasions intercourse between the plaintiff and defendant was renewed. On January 16, 1933, a decree nisi was granted to the respondent's wife, the judge finding that the alleged adultery with the appellant was proved. I will deal later with the form of the decree. It was not disputed that after the decree nisi, but before it was made absolute, the respondent again agreed to marry the appellant if and when the decree was made absolute. On or about June 14, before the decree was made absolute, the respondent through his solicitor, a Mr. Giddins, repudiated this agreement; and the appellant was told that the respondent would not marry her. On July 31, 1933, the decree was made absolute; the respondent again refused to marry the appellant; and in 1934 made his marriage to her impossible by marrying another lady. The trial judge held that a promise made after the decree nisi to marry if and when the decree was made absolute, was contrary to public policy and was, therefore, void and unenforceable.

The exact question has never arisen before in this country:

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but reliance was placed on the decisions in *Spiers* v. *Hunt* (1); *Wilson* v. *Carnley* (2); *Skipp* v. *Kelly* (3); and *Noice* v. *Brown* (4) (which had been approved in the English Courts), as making it necessary to hold that a promise made after a decree nisi to marry if and when the decree was made absolute was against public policy.

Before dealing with the authorities, I think it is desirable to consider how it became the duty of the Court to make the decree in the first instance a decree nisi, and what the form and effect of such a decree should be considered to be. Until the passing of the Matrimonial Causes Act of 1857 no Court had any power to decree a divorce between two married persons for any cause whatever. The jurisdiction with regard to orders relating to modification of marriage obligations was vested in Ecclesiastical Courts known as Diocesan or Consistory Courts, and the Court of Arches, whose powers did not extend beyond decreeing a divorce a mensa et thoro, which is the same as what was later called judicial separation; though, of course, any one who could persuade Parliament to pass an Act divorcing the two parties to the marriage, could succeed in getting a statutory divorce. By the Act of 1857 the Divorce Court was created: and the Court was empowered, if certain facts were proved with regard to the conduct of a husband or a wife, to grant a divorce; thus converting two married people into unmarried people. Until the passing of the Matrimonial Causes Act of 1860 divorce was brought about immediately after the trial and operated without any period of suspension, such as the three months provided for in the Act of 1860, extended to six months by a later Act. The reason for this provision had nothing whatever to do with the consideration that it was desirable to give the parties a period of time in which they might reconsider their relations and become reconciled and resume cohabitation.

Sect. 7 of the Act of 1860 provides as follows: "Every decree for a divorce shall in the first instance be a decree nisi, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the Court shall by general or special Order from time to time direct: and during that period any person shall be at liberty, in such manner as the Court shall by general or special Order in that behalf from time to time direct, to shew cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court; and, on cause being so shewn, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require." These words seem to me clearly to indicate that it was not contemplated that there should be any change in the form of the decree except that it should be a decree nisi which should not be made absolute until the statutory time elapsed, because it was necessary in the public interest to give an opportunity to the Queen's Proctor or other persons to show cause why, notwithstanding the decision of the judge at the hearing of the petition, the decree should not be made absolute; and if the judge on considering the matter decided that it ought not to be made absolute, the decree nisi should be reversed. Neither the Act of 1860 nor the Act of 1866 required any application to be made by the petitioner to make the decree nisi absolute. It was, however, not very convenient that the judge should at the end of a period of suspension make the order absolute without some application to him; and a rule of practice was made under which it became necessary for the petitioner to apply to make the decree nisi absolute. This rule of practice had the unfortunate result of enabling the petitioner to keep the marriage alive for a period in excess of the statutory six months, by refraining from making any application that the decree should be made absolute; and it has been decided that the guilty respondent could not himself or herself, as the case might be, apply to have the decree made absolute; and that their only remedy was to apply that the petition should be dismissed and the decree nisi reversed if a reasonable time had elapsed for the petitioner to make an application. This remedy was, of course, of no value to a respondent who did not want the decree reversed, but wanted to be free from a marriage which had been conditionally dissolved by the decree nisi. By the form of decree nisi invariably used in the Divorce Court the Court decreed that the marriage be dissolved unless sufficient cause be shown to the Court why the decree should not be made absolute within six months of the making thereof: see the form of decree on p. 650 of Rayden and Mortimer on Divorce (3rd ed.).

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(1) [1908] 1 K. B. 720.

(2) [1908] 1 K. B. 729.

(3) (1926) 42 Times L. R. 258.

(4) N. J. Ct. of Err. & App. (1876) 23 Am. Rep. 213, affirming N. J. Sup. Ct. 20 Am. Rep. 388.

It seems to me that a decree nisi adjudging that the spouses should be divorced unless sufficient cause should be shown, etc., makes a vital change in the relation of the two spouses to one another. It relieves the petitioner from all his or her duties arising out of the marriage; and as a necessary consequence, relieves the other party to the decree from the matrimonial obligations which were undertaken in consideration of those undertaken by the petitioner. Of course, if the rare event happened of the parties becoming reconciled before the decree nisi was made absolute, the petitioner would be entitled to ask the Court, in place of making the decree absolute, to reverse or discharge it altogether: but it seems to me that as long as the decree nisi is in force, it relieves both parties from the obligations that married persons owe to one another. A decree nisi puts an end to the whole content of the marriage contract, leaving only the shell, that is, the technical bond. I may add that it is common knowledge that in the vast majority of cases decrees nisi are in due course made absolute.

I cannot myself see that after a decree nisi a promise by the respondent to marry if and when the decree is made absolute is contrary to public policy. If that promise be made to a third person, not a party to the divorce proceedings, who is perfectly innocent, it seems to me impossible to hold that such a promise has any tendency to cause immoral relations. In such a case I think it has quite the opposite tendency, because the contracting parties have every reason to expect that they will be free in a short time to make a regular union;

and they are unlikely to be tempted by the promise of marriage to indulge in sexual intercourse before the period arrives when they are free to marry and may lawfully have such intercourse. In a case like the present where the promise was made by the respondent to his partner in the act of adultery on which the decree nisi was founded, I also think it is not contrary to public policy that they should bind themselves if and when the decree is made absolute to marry one another and make lawful the relations between them. I should think public policy would be rather to encourage them in the event of their being free to become married people. Consider the circumstances in which persons in the position in which the plaintiff and the defendant found themselves after the decree nisi are placed. If the woman says to the respondent: "Now in all probability you will be freed from the marriage bond in about six months when the decree is made absolute: will you marry me then?" what is he to answer? Is it in the interests of morality, decency or public policy that he should say "No"? By "No" he might mean: "No, I prefer to maintain the status quo and continue to have you as my mistress"; or he might mean: "No, I prefer to retain my freedom to throw you over and marry some one else, or remain unmarried." In my judgment morality, decency, and public policy are in favour of his answering in the affirmative and promising, as the defendant did, that as soon as it should become lawful for him to do so he would by marriage regularize the irregular union he had formed, and that this contract should be held binding in law. The chance of a reconciliation with the petitioning wife is so remote that I think it may be disregarded.

I now proceed to deal with the authorities. Before dealing with the authorities relied upon by the learned trial judge, I should like to call attention to the decision of Lord Cairns in *Prole* v. *Soady* (1), in which he uses these words: "I am of opinion that, according to the Act, it is impossible to hold otherwise than that the order nisi is the decree which the Court eventually makes absolute against the parties. Therefore

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(1) (1868) L. R. 3 Ch. 220, 225.

I think the order absolute in this case took effect from the date of the order nisi . . . . and that everything done in the interval was subject to the danger of being set aside by the order becoming absolute." It seems to me that this decision assists the argument that once the decree is made absolute the divorce dates from the date of the decree nisi and justifies me in referring to the decree nisi as a conditional decree of divorce. In *Spiers* v. *Hunt* (1) it was held by Phillimore J. that a woman whom the defendant promised to marry on the death of his wife with the intention known to her of inducing her to commit adultery with him, could not sue on the promise, as she was aware that the defendant was married when he made the promise. I have no hesitation in saying that I entirely agree with the decision in that case. A similar promise by a man to marry on the death of his wife was held to be illegal by the Court of Appeal in *Wilson* v. *Carnley* (2), in which they reversed the finding of Lord Coleridge, who tried the case as a Commissioner of Assize. Vaughan Williams L.J. in his judgment bases his decision on two grounds: one, that the contract had a tendency to induce one of the parties to do something contrary to the general rules of morality; and that it had that effect was proved by the evidence in the case. The second ground was that the contract was one which had a tendency to make the defendant, who in the lifetime of his wife had promised to marry another woman, do something which was in contravention of the obligations which are recognized in this country as owing from a husband to his wife. He also added that it might have a tendency to induce the husband to take less care than he ought to take of the health of his wife. I think the judgments of Farwell L.J. and Kennedy L.J. were grounded on the fact that a contract of the kind in question was against public policy by reason of its tendency to cause immorality. In both the cases cited the Court referred with approval to the judgment of Lawrence C.J. of Illinois in *Paddock* v. *Robinson*. (3) They do not seem to

(1) [1908] 1 K. B. 720.
(2) [1908] 1 K. B. 729.
(3) (1871) 14 Am. Rep. 112.

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have referred to the other American decision of *Noice* v. *Brown* (1), where it was decided that a promise to marry by a respondent against whom proceedings for divorce on his wife's petition were pending, was void as contrary to public policy. It is to be observed that at the time this case was decided in the Supreme Court of New Jersey, there does not appear to have been any provision in the law of New Jersey that a decree of divorce should be in the first instance a decree nisi, though subsequently the law was altered in that respect; but that does not seem to me to be material, because I think it is clear from the report that if the law of New Jersey at that time did provide for a decree nisi, no decree nisi had in fact been made. The only case reported in English reports on the question whether a promise made by a respondent to marry after divorce proceedings have been commenced was or was not void, is the case of *Skipp* v. *Kelly*. (2) In that case Lord Dunedin, in delivering the judgment of the Privy Council, said it was quite settled law that a promise made before decree of divorce was a void promise: but neither in this case, nor in any other case that has come before the Courts did the question arise as to the validity or invalidity of a promise made after decree nisi. I do not think any of these cases compel me to hold that a promise to marry made after a decree nisi whereby the bond of marriage has been conditionally dissolved, and the duties of the spouses to love and cherish and be loyal to one another have ceased to be binding, is illegal as contrary either to morality or to public policy. A very considerable number of cases were cited with regard to the fluid character of what is described as public policy; but I do not think it necessary to refer to them beyond saying that it is clear that ideas of public policy with regard to matrimonial relations, as with regard to economic matters, have suffered very considerable changes from time to time.

In my judgment, for the reasons I have given, I think the promise of marriage made by the respondent in this case after the decree nisi, was not invalid in law; and that

(1) 23 Am. Rep. 213.

(2) 42 Times L. R. 258.

the appellant is entitled to the damages which the jury have assessed in this case, that is to say, 2000*l*. If my view prevailed, the judgment would be set aside, with costs, and judgment entered for the appellant for 2000*l*. damages and costs ; but inasmuch as my brethren take a different view, the result will be as they state.

SLESSER L.J. The facts in this case have been fully stated by Greer L.J. ; I do not find it necessary to repeat them.

In my opinion it is impossible, having regard to the decision of this Court in *Wilson* v. *Carnley* (1), following a judgment of Phillimore J., as he then was, in *Spiers* v. *Hunt* (2), to hold otherwise than that a promise to marry, being made by a man married to the knowledge of the plaintiff, is unenforceable as a legal contract in law on the ground that the entertainment of such an action, based upon such an agreement, would be contrary to public policy.

Mr. Eddy for the plaintiff has sought to distinguish this case from those which I have already cited on the ground that although, admittedly, the defendant was married at the time of the promises made to the plaintiff, such promises took place between the time that the defendant's wife had obtained a decree nisi in the Divorce Court and the time when such a decree nisi was made absolute : he points out that the promises made in *Wilson* v. *Carnley* (1) and in *Spiers* v. *Hunt* (2) were made by married men against whom no proceedings in divorce had been taken ; and he submits that the considerations of public policy which prevailed in those cases do not apply where the facts are that, owing to a decree nisi having been made, the defendant and his wife are separated and no longer in full matrimonial relation.

To test the validity of this argument, it is necessary in the first place to consider what the exact grounds were for refusing to enforce the promises in the earlier authorities which I have mentioned, and what considerations moved the Court in coming to conclusions adverse to the plaintiff. In *Spiers* v. *Hunt* (2) the defendant, who to the plaintiff's

(1) [1908] 1 K. B. 729.

(2) [1908] 1 K. B. 720.

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knowledge was a married man, promised in 1899 to marry the plaintiff on the death of his wife. Sexual intercourse took place between them at that time and continued until March, 1904. In July, 1907, the defendant's wife died, and the defendant subsequently refused to marry the plaintiff, who thereupon sued him for breach of promise of marriage. Phillimore J., as he then was, states (1): "The tendency of such a contract is to make the husband in thought, if not in deed, unfaithful to his wife. In certain cases it might even lead to crime. Its very probable result is sexual immorality." In *Wilson* v. *Carnley* (2), where, apparently, no suggestion of sexual intercourse between the plaintiff and the defendant was made, but where also the plaintiff knew the defendant was a married man, Vaughan Williams L.J. said (3): "I have no doubt that this was a contract which had a tendency to make the defendant, who in the lifetime of his wife had promised to marry another woman, do something which was in contravention of the obligations which are recognised in this country as owing from a husband to his wife. It is sufficient to say that this is obviously a contract which a husband in his wife's lifetime could not enter into without being disloyal to his wife." Farwell L.J. said (4): "Such a contract as that sued upon in the present case is not only inconsistent with that affection which ought to subsist between married persons, but is calculated to act as a direct inducement to immorality"; and Kennedy L.J. said (5): "Such a bargain as this is against public policy as tending to immorality."

I quote in especial these dicta because they are the basis of the judgments which Mr. Eddy contends have no application to a case where a wife has already obtained a decree nisi against her husband. He argues that the obligation of loyalty of the husband to the wife, to which Vaughan Williams L.J. made reference in the passage I have quoted, can have no application to such a case as this; and that the grounds of

(1) [1908] 1 K. B. 724.
(2) [1908] 1 K. B. 729.
(3) Ibid. 735.
(4) Ibid. 740.
(5) Ibid. 742.

public policy referred to in this Court cannot apply where divorce proceedings resulting in a decree nisi have been taken.

It is true, as Kennedy L.J. said in *Wilson* v. *Carnley* (1), that "'public policy' is a wide and general term, which embraces very different cases"; but he cites as illustrations where public policy may be invoked "where certain contracts are treated by the law as being against public policy by reason of elementary considerations of morality"; and also mentions cases where the law treats contracts as being against public policy "by reason of some advantage to the public which is supposed to arise from such contracts being forbidden."

In my view, both considerations arise in the present action for reasons well-founded on authority. I think it is right to say that the law has always looked with disfavour on agreements which tend to produce separation or to protract separation between husband and wife. Between the period of the decree nisi and the decree absolute there is nothing in the law dealing with dissolution of marriage to prevent the spouses from resuming cohabitation. During the interval, the petitioner may make up her mind not to proceed with the divorce, and cases have been adjourned in order to give her a longer period of time for consideration. See *Parsons* v. *Parsons* (2) and in *Quartermaine* v. *Quartermaine and Glenister* (3), where a petitioner had agreed after decree nisi to resume cohabitation with the respondent, submitting that the petition should be dismissed for want of prosecution, the decree nisi was by order of Bargrave Deane J. rescinded; see also *Flower* v. *Flower*. (4) Moreover, where the petitioner failed to apply within a year to obtain a decree absolute, on application by the respondent to make absolute or to dismiss the petition for want of prosecution, the petition was dismissed unless within a week the necessary steps were taken to have the decree made absolute: *Lewis* v. *Lewis*. (5) See also *Ousey* v. *Ousey and Atkinson* (6) and in *Rutter* v. *Rutter* (No. 2) (7) it was also made clear that the Court has power

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(1) [1908] 1 K. B. 720, 743.
(2) [1907] P. 331.
(3) [1911] P. 180.
(4) [1893] P. 290.
(5) [1892] P. 212.
(6) (1875) 1 P. D 56.
(7) [1921] P. 421.

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in a proper case to rescind a decree nisi on the application of the party who obtained it.

These cases and others to the like effect make it clear that during the six months between the decree nisi and the application to make the decree absolute, the law allows the parties to take the proper steps to rescind the decree and so enables them to resume their full matrimonial relation.

Next, it is clear that the law has always favoured such a resumption of the matrimonial life notwithstanding that the parties have separated and one of them has taken proceedings in divorce.

A provision contemplating future separation of spouses, normally unenforceable, need not be void in the case of a deed executed by them while living apart, with the object and result of bringing them together as man and wife, on the ground of public policy: *In re Meyrick's Settlement* (1); *MacMahon* v. *MacMahon.* (2) In *Harrison* v. *Harrison* (3) Walton J. held that an agreement for future separation made when the parties were apart, was not contrary to public policy when "its object was mainly to enable them to live together again." Finally, I would quote Palles C.B. in *MacMahon's* case (4) to the effect that "an agreement for reconciliation is a matter which the law ought to encourage"; and Knight Bruce L.J. in *Cartwright* v. *Cartwright* (5): "I apprehend the theory of the law to be, that a man and his wife cannot live in a state of separation from each other . . . . without some failure on the part of one or both in the performance of duties in the fulfilment of which society has an interest."

In my judgment, such a promise as the defendant here has made must necessarily tend to prevent reconciliation between the separated spouses. It was argued by Mr. Eddy that, inasmuch as the promise to marry was conditional upon the decree being made absolute, the fear of an action cannot deter the defendant from going back to his wife, if she were willing to receive him, in so far as, in such a case, the decree would never become absolute and the plaintiff could never sue. Such a proposition seems to me entirely unreal. Apart from the strictly legal question whether the defendant could himself take advantage of this condition, it is obvious that the mere existence of such an agreement with another woman, whether morally or legally binding, could only operate to make the reconciliation of husband and wife more difficult, and this apart from the facts of this particular appeal, where at the time of the promises made the plaintiff and the defendant were in immoral sexual relations. I think it is evident that the promise made must be a real hindrance to the spouses resuming their normal matrimonial life, and as such I think it is contrary to public policy.

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(1) [1921] 1 Ch. 311.
(2) [1913] 1 I. R. 428.
(3) [1910] 1 K. B. 35, 40.
(4) [1913] 1 I. R. 444.
(5) (1853) 3 De G. M. & G. 982, 988.

Mr. Eddy further contended that public opinion in these matters of matrimonial obligation had undergone such changes that what might have been taken to be against the public interest some years ago, cannot any longer be so regarded. Though as a matter of history, Paley in his " Moral Philosophy " refers to a casuistical opinion by Bishop Sanderson, in the seventeenth century, that a promise by a married man to marry another, his wife being sick, is void, and disagrees with it—says Paley (Book III, Part I, chapter 5) (1) " a promise does not lose its obligation merely because it proceeded from an unlawful motive." In any case the argument rests upon the fallacy that because opportunities for dissolution of marriage are now given by statute, and the discretion of the Divorce Court may have been extended, the matrimonial relation, when it has not been dissolved, is fundamentally other than it used to be. There is no doubt that the mere granting of a decree nisi does not put an end to marriage. In *Norman* v. *Villars* (2) it was held in this Court that the status of a married woman is not affected by the pronouncing of a decree nisi for the dissolution of marriage. As Lord Cairns L.C. said (3): " the status of a married woman remains the same until the decree is made absolute "; and Baggallay L.J. said (3): " there is no effective decree until it has been made absolute." See also

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(1) Ed. 1838, pp. 63, 64.

(2) (1877) 2 Ex. D. 359.

(3) Ibid. 364.

Bowen L.J. to the same effect in *Ellis* v. *Ellis* (1); and all the incidents of marriage as such remain intact except those incompatible with the granting of the decree nisi, and the full matrimonial state may be resumed upon cohabitation at any time before the decree is made absolute. The marriage state continues between decree nisi and absolute and sexual intercourse between either of the parties and a third party is adultery: *Hulse* v. *Hulse and Tavernor.* (2) The nature of marriage has, in my view, in no wise been altered by the opportunities now given by statute for its termination. It has very recently been decided that a marriage may be valid according to English law notwithstanding that it could, according to a foreign law, be dissolved by mutual consent or at the will of either party with merely formal conditions of official registration: *Nachimson* v. *Nachimson.* (3) As was pointed out by Lord Brougham in *Warrender* v. *Warrender* (4), dissolubility is not of the essence of the contract of marriage. "The fallacy of the argument, that 'indissolubility is of the essence,' appears plainly to be this: it confounds incidents with essence." Finally, Lord Penzance, in *Hyde* v. *Hyde and Woodmansee* (5), speaking after the Matrimonial Causes Act, 1857, said: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." "The English law discountenances any arrangement which will tend to produce separation between husband and wife," per Phillimore J. in *Spiers* v. *Hunt.* (6)

It is clear, therefore, that though certain of the incidents of marriage may have been varied from time to time by statute or by authority, the prime nature of the relation, be it by contract or status, has not been essentially modified; and the desirability of the coming together of separated husband and wife is as much held by the law to-day as at any previous period which we are called upon to consider. That the practice of the Divorce Court to exercise a discretion in granting divorces to a party guilty of misconduct may have varied, or that contracts for present separation may now be held valid, is nothing to the point.

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(1) (1883) 8 P. D. 188, 190.

(2) (1871) L. R. 2 P. & M. 259.

(3) [1930] P. 217.

(4) (1835) 2 Cl. & F. 488, 533.

(5) (1866) L. R. 1 P. & M. 130, 133.

(6) [1908] 1 K. B. 720, 724.

In conclusion, I would cite certain authorities which fortify my conclusion. In *Skipp* v. *Kelly* (1) it was held in the Privy Council that where a plaintiff, who at the time was a married woman, accepted the defendant's proposal of marriage, provided that she obtained a divorce, and the plaintiff did obtain a divorce, the defendant ultimately marrying another woman, the contract was unenforceable on the ground of public policy. The case is only distinguishable from the present on the ground that in Mysore at that time a decree of divorce was made by one decree, as was the position in England before the passing of the Matrimonial Causes Act, 1860, s. 7. In the language of Lord Dunedin (2), pronouncing the opinion of the Privy Council: "It had been quite settled in law that a promise made in these circumstances was a void promise." And in the American decision of *Noice* v. *Brown* (3) a similar conclusion was arrived at, though in that case also divorce at that time was effected by one decree only.

For these reasons, in my opinion the learned judge was right in holding that the agreement of the defendant to marry the plaintiff was void. As Greene L.J. is of the like opinion, this appeal must be dismissed with costs.

GREENE L.J. (read by SLESSER L.J.). It is beyond dispute that a promise of marriage made by a man who to the knowledge of the promisee was married at the time when the promise was made, is void as being against public policy: the reason being that any such promise in its nature tends to induce the promisor to act contrary to the rules of morality: *Spiers* v. *Hunt* (4) and *Wilson* v. *Carnley*. (5) The question which arises in this case is whether the rule extends to invalidate a promise of marriage made by a man, against whom his wife has obtained a decree nisi, in the interval between

(1) 42 Times L. R. 258.
(2) Ibid. 259.
(3) 20 Am. Rep. 388; 23 Am. Rep. 213.
(4) [1908] 1 K. B. 720.
(5) [1908] 1 K. B. 729.

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decree nisi and decree absolute. Hawke J. held that it does; and I agree with his conclusion.

Under the Matrimonial Causes Act, 1857, by which jurisdiction to grant divorce a vinculo matrimonii was granted to the Court, there was only one decree, which, subject to a right of appeal, was final. The decree nisi was introduced by the Matrimonial Causes Act, 1860, s. 7. Its primary, if not its sole object, was, in the words of Sir James Hannen P., "to give time for the Queen's Proctor and other parties to bring to the knowledge of the Court any facts which would deprive the petitioner of his inchoate right to have the decree made absolute": *Ousey* v. *Ousey*. (1) Until the decree becomes absolute, the parties are still husband and wife. If either party during the period between decree nisi and decree absolute has sexual relations with a third person he or she is committing adultery, and in the case of the petitioner such conduct is ground for intervention by the King's Proctor: *Hulse* v. *Hulse and Tavernor*. (2) Application to have the decree made absolute can only be made by the petitioner; if the petitioner omits to apply, the only remedy of the respondent is to apply to have the petition dismissed for want of prosecution: *Ousey* v. *Ousey*. (3) The Court has jurisdiction on the application of the petitioner to rescind a decree nisi, a jurisdiction which in a proper case it might well exercise if satisfied that there was a bona fide desire on the part of the petitioner to resume cohabitation: *Rutter* v. *Rutter* (No. 2). (4)

Prima facie, therefore, the rule of public policy extends to cover the present case, since the promise in question was undoubtedly made by the defendant while still married to his former wife. But it is argued that once a decree nisi has been obtained, the rule is no longer applicable, since the obligation of loyalty between the spouses which prevented the making of the promise has, it is said, been destroyed. Mr. Eddy on behalf of the appellant at first limited his contention to the case of a promise made by the respondent in the divorce proceedings, and he said that, as the petitioner

(1) 1 P. D. 56, 63.
(2) L. R. 2 P. & M. 259, 262.
(3) 1 P. D. 56.
(4) [1921] P. 421.

by her act in carrying those proceedings as far as decree nisi had in effect said that she no longer wished to have the respondent as her husband, he was by her action released from his obligation of loyalty towards her. This attempted distinction between the two cases suggests two observations. First, it might be said with greater truth that it was the action of the respondent in being unfaithful which released the petitioner from her obligation of loyalty; secondly, the distinction would result in giving to the guilty party a greater liberty of contract than that enjoyed by the innocent party. But I need not pursue this further, since Mr. Eddy at a later stage in his argument abandoned, as I think he was bound to abandon, the attempt to distinguish between a petitioner and a respondent, and agreed that they both stand in the same position. Upon this basis, if the proposition be tested by reference to the position of the petitioner, it is, in my opinion, impossible to say that such a promise made by a petitioner after she has obtained a decree nisi would not be covered by the general rule. The petitioner is not released from the obligations of the married state merely by obtaining a decree nisi. Her duty to remain loyal to those obligations remains down to the making of the decree absolute, and a contract whose tendency is to lead to a breach of the rules of morality by a petitioner is, in my opinion, just as much against public policy if it is made after decree nisi as it is if made before. The same is, in my opinion, true of the respondent. Such a contract appears to me to be clearly one tending to lead to a breach of the rules of morality in that it tends to encourage or facilitate immorality which is none the less adultery by reason of the fact that a decree nisi has been obtained. The facts of the present case afford an illustration of this tendency, and it cannot be said that the law can look with indulgence upon it merely because the respondent by his own guilty actions has been the cause of the decree nisi being obtained.

In addition to these considerations, there is a further reason why, in my opinion, the promise is against public policy. At any time before the pronouncement of a decree nisi the parties have an opportunity of reconciliation. I conceive that the law should regard with favour a reconciliation between spouses, not merely from the point of view of the public interest in preserving and maintaining the married state, but also from the point of view of the children of the marriage, if any such there be. It appears to me to be nothing to the point to say that such reconciliations are in practice comparatively rare. The possibility exists ; and I take the view that it would be improper to establish an exception from the general rule which would tend to make reconciliation more difficult. That the class of promise with which the present case is concerned would have such a tendency I have no doubt. Apart from the reluctance of the promisor himself to make the performance of his promise impossible by being reconciled to his wife, the existence of the promise might and probably would lead to the exercise of pressure upon him by the promisee. I need not discuss the further question whether a promisor who, by agreeing to become reconciled to his wife, made the condition upon which the promise was to become effective impossible of fulfilment might not expose himself to an action for damages.

Three further arguments put forward by Mr. Eddy call for comment. He said that as the promise was conditional only, and that as it lay with the petitioner to decide whether or not the condition upon which it was to become effective, namely, the pronouncement of a decree absolute, should ever come into operation, the promise should be held binding. I am unable to appreciate this argument. All promises to marry made by a married person are necessarily conditional, unless it is to be assumed that the promise is to contract a bigamous marriage ; while the argument that the decision rests with the petitioner disregards the fact that a decision to become reconciled must be the decision of both. Moreover, it appears to me to be inconsistent with Mr. Eddy's final submission as to the absence of any distinction between the case of a promise made by the petitioner and a promise made by the respondent.

Mr. Eddy also argued that it is in the public interest that the regularization of irregular relations should be encouraged. I am quite unable to accept this as a general proposition upon which to found a rule of public policy. In particular cases upon particular facts regularization of such relations may be desirable, and in exercising its discretion in divorce proceedings the Court may well take that consideration into account. But in exercising a discretionary jurisdiction the Court can and must take into account the facts of the individual case, whereas in considering matters of public policy it is the tendency of the class of contract concerned and not the special facts of the individual case which must be considered. " The law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition ; and if the law is to be practically applied, it cannot be administered with reference to the character of the individuals to whom the question may relate " : per Lord Truro, in *Egerton* v. *Earl Brownlow.* (1) Covenants in restraint of trade are no exception to this rule, since in those cases it depends upon the facts of each individual case whether or not the restraint is reasonable. The argument, moreover, leads to a highly illogical result. If accepted as the ground for making an exception to the general rule it would mean that a promise made to a third party with whom the promisor's relations were innocent would be void, whereas a promise made to his or her partner in guilt would be binding. The suggested principle would lead to results even more remarkable if applied in the case of a promise made by a petitioner.

The last argument submitted by Mr. Eddy was that the Court may properly examine the special facts of the present case in order to see whether upon those facts the promise in question has led, or was likely to lead, to undesirable results. I have already stated my reasons for thinking that the Court cannot embark upon any such examination.

Appeal dismissed.

J. P. Eddy asked for leave to appeal to the House of Lords.

(1) (1853) 4 H. L. C. 1, 196.

GREER L.J. We think this is a case which might properly be considered by the House of Lords; and we, therefore, give you leave.

Solicitors for appellant: *Percy Haseldine & Co.*
Solicitors for respondent: *Sutton, Ommanney & Oliver.*

R. F. S.

1935
April 10, 11.

KIMBERS AND COMPANY AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

Revenue—Stamp Duty—Conveyance—Contemporaneous contracts for sale of land and for erection of house thereon—Consideration on which Duty to be based—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch. I.—Finance* (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 73.

A contract for the sale of land for 500*l.* was entered into, to be completed in three weeks. On the same date a contract between the same parties, expressed as conditional on the completion of the contract of sale, was entered into, whereby the vendor of the land contracted to build a house thereon for the purchaser for 1350*l.*

It was contended by the Revenue Authorities that this was one transaction and that the amount of stamp duty on the conveyance should be on the real consideration therefor—namely, the aggregate of the above sums, 1850*l*:—

Held, that this was not a contract for the sale of a house and the land on which it stood, but constituted separate transactions, a contract of sale of land and a contract to build a house thereon, and that duty on 500*l.* only was payable.

M'Innes v. *Inland Revenue* 1934 S. C. 424, distinguished.

CASE stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

On April 1, 1935, the appellants, Messrs. Kimbers, Williams, Sweetland & Stinson, solicitors for the purchaser, presented a deed of conveyance to the Commissioners for their opinion as to the duty with which it was chargeable. The contract to purchase the land was dated January 28, to be completed on February 21.

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The deed was dated March 4, 1935, and purported to be a conveyance on sale of a plot of land for 500*l.* The deed contained a statement that the value of the consideration did not exceed 500*l.* and that the transaction effected by it did not form part of a larger transaction or of a series of transactions in respect of which the total consideration exceeded 500*l.*

At the same time, for their information, two contracts between the same parties, each dated January 28, 1935, were submitted to the Commissioners. The first was the before mentioned contract for the sale for 500*l.* of the plot of land referred to in the conveyance. The second, expressed to be conditional on completion of the purchase of the land, was a contract for the building by the vendor on the above plot of land, of a house for the price of 1350*l.*, payable by instalments. On March 4, 1935, the date of the conveyance, the house was in fact partially erected, the builder, the vendor, having entered on the land and commenced building earlier than had been anticipated, and work to the value of 300*l.* had been done on it. On that date the purchaser paid to the vendor 450*l.*, the balance of the consideration of the conveyance, and 250*l.* in respect of the building of the house.

It was contended by the Commissioners that this was a single transaction for the sale of a plot of land with a house on it, and consequently, that the 1350*l.* payable in respect of the house must be deemed to be part of the consideration for the whole transaction, the total being 1850*l.* Accordingly they assessed the duty, at the rate of 10*s.* for every 50*l.*, at 18*l.* 10*s.* in accordance with the charge "Conveyance or transfer on sale, of any property [except certain stock] where the amount or value of the consideration for the sale exceeds . . . . 300*l.*" in Sch. I. to the Stamp Act, 1891, and with s. 73 of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8).

It was contended on behalf of the appellants that the transaction was a conveyance on sale of the land only for 500*l.*, and that it did not form part of a larger transaction, and that the duty payable under the proviso to s. 73 of the Act of 1910 was 2*l.* 10*s.* Alternatively they contended that the duty should be assessed on 800*l.*—namely, 500*l.*, the purchase price of the land, plus 300*l.*, the value of the building on the land at the date of the conveyance.

Gover K.C. and *W. E. Vernon* for the appellants. The Commissioners were wrong. The conveyance was of the land only, for which the consideration was 500*l.*, and the contract to build a house thereon was entirely distinct. It is only the accidental circumstance that the vendor and the builder under the contract is the same person that makes it possible to argue that the whole transaction was one. The building contract was distinct from the conveyance and was made for a different consideration. The Crown relies on the Scotch case of *M'Innes* v. *Inland Revenue.* (1) But that case was decided on the basis that there was a sale of land with a house on it. In the present case there can be no question of such a sale, for the date of the contract to purchase the land was January 28, and of its completion the following February 21. The date of the contract to build was January 28, therefore the parties could not have contemplated that there would be a house on the land at the date of completion, February 21.

Sir Thomas Inskip A.-G. and *J. H. Stamp* for the Commissioners. The duty payable is on 1850*l.*, the consideration for the conveyance of the land with the house contracted to be erected thereon. This was one transaction—namely, the sale of a piece of land with a house on it, and is not distinguishable from the Scotch case of *M'Innes* v. *Inland Revenue.* (1) The whole object of the parties was that the vendor should sell and the purchaser buy the site so that the vendor should erect a house thereon, and were it not for this latter consideration the price of the land might well have been higher.

FINLAY J. Like most cases under the Stamp Act, 1891, this case is a troublesome one, but I have come to the conclusion that the argument for the appellants ought to prevail. To a substantial extent the matter depends on

(1) 1934 S. C. 424.

what is the proper inference to be drawn from the facts, and the real question is: What was the consideration for the conveyance of the land? The substance of the transaction must be examined to determine what was the consideration.

It was contended on behalf of the Crown that if the documents as a whole were looked at it would be found that the consideration, in substance, was not merely the 500*l.* but also the 1350*l.* payable for the building of the house on the land, and that the contract for the sale of the land and the building contract formed really one transaction. For the appellants it was contended that there were two separate and distinct contracts, and that that is shown by the fact that the one is expressed to be conditional on the other.

With regard to the contract of sale and purchase of the land, it is not disputed that the consideration expressed is 500*l.* and is a genuine consideration. In view of the Scotch case of *M'Innes v. Inland Revenue* (1) on which the Crown places great reliance, it is material to note that the date of the contract of sale was January 28, and that the purchase was to be completed on February 21, although in fact completed somewhat later. It is therefore plain that the parties did not contemplate that the house would be completed by the date fixed for the completion of the contract of sale of the land.

Clause 7 of the contract of sale, dated January 28, 1935, was relied on by both parties and is as follows: "Contemporaneously with the exchange of this contract the parties hereto have entered into a separate contract whereby the vendor undertakes to erect a house upon the plot for the purchaser upon the terms and for the price therein mentioned. It is hereby agreed that the building contract is a conditional contract and that the same shall become absolute and binding upon the parties hereto upon completion of the purchase of the plot. Provided always that if the purchaser shall be under a duty to but shall neglect or fail to complete her purchase of the plot according to this agreement then (for

(1) 1934 S. C. 424.

the purpose of assessing any damages to which the vendor may be entitled by reason of such neglect or failure) the building contract shall at all times be deemed to be an absolute contract."

In my opinion the meaning of that is plain, and its importance is that it makes it quite clear that there are two distinct contracts, one absolute and the other conditional, and shows that the parties contemplated and intended that there should be first of all a sale of the plot of land, and then when that sale had been completed, that a house should be built on the site by the vendor. The Crown placed great reliance on the circumstance that the vendor of the land was to be the builder of the house. There would have been no arguable case for the Crown if there had been on the one hand a sale of the plot and on the other hand a contract with an outside builder to build a house on it.

The other material contract is the building contract, also dated January 28, 1935, para. 2 of which is as follows: "The purchaser [of the plot] shall forthwith give the company [the vendor] vacant possession of the said premises and the company shall complete the said dwelling-house in a good and workmanlike manner to the reasonable satisfaction of the purchaser on or before August 31, 1935." In my opinion that also shows that what was contemplated was that the agreement for the building of the house should come into operation when completion of the purchase of the land had occurred. It is not material that in this particular case the vendor began building before completion of the purchase of the land and that at the date of that completion an expenditure of some 300*l.* had been incurred on the house.

It is not necessary to refer in detail to the provisions of the Stamp Act, 1891. Those dealing with conveyance are to be found in Sch. I., which makes it clear that what is to be ascertained is the consideration for the sale. Sect. 10 of the Finance Act, 1900 (63 Vict. c. 7), is of some assistance to the appellants' argument, particularly when regard is had to the manner in which that section was dealt with by the Inner

House in *M'Innes* v. *Inland Revenue*, (1) to which I shall refer later.

Apart from that case the matter seems to me to be reasonably clear. Both sides agree that in the interval between a contract for sale of land and the conveyance the purchaser is the equitable owner, and that the vendor, although not what is called a bare trustee, is a trustee for the purchaser. There is, therefore, no doubt at all, that from the date of the contract of sale the purchaser was, in equity, the owner of the plot of land, and I should have thought it plain that the building contract was separate from the contract for the sale of the land by reason of the fact that the former was conditional on the latter. No doubt there is an obvious connection between the two contracts, arising from the fact that the vendor of the land was the builder of the house, but I cannot help thinking that but for this, to some extent, accidental circumstance, this difficulty and the contention that these two contracts are one transaction, would not have arisen. The matter can easily be tested by considering what the position would have been if the purchaser, having bought the land from the vendor, had contracted with another builder for the erection of the house. As I have said, in that case there would have been no arguable case for the Crown. In my opinion the two contracts do not form part of one transaction. There are two transactions expressed in two separate documents, one being conditional on the other.

Some difficulty is caused by the case of *M'Innes* v. *Inland Revenue* (1), which bears some resemblance to the present case. It is not binding on me, but I think it is well settled that where a statute is applicable both to England and to Scotland a judge of first instance sitting in England should follow a decision of the Inner House of the Court of Session where he is satisfied that the decision applies, and were I so satisfied, I should do so.

While that case undoubtedly bears some resemblance to the present one, I have come to the conclusion that it can

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and ought to be distinguished. In that case a man entered into a feu-contract with reference to a plot of land in Scotland. Before the execution of the feu-contract a house had been built on the land in pursuance of an agreement entered into between the purchaser and a company of builders in which the vendor of the land held a controlling interest. The original offer of the land by the vendor to the purchaser, which offer was accepted, was made on the same date as the building agreement, that is, at a time when there was no building on the land. The Commissioners of Inland Revenue assessed the duty on the feu-contract on the basis that the total consideration involved in the conveyance on sale included also the value of the house. On those facts the Inner House came to the conclusion that the assessment, which covered both the feu-duty capitalized and the price of the house, was right. The gist of the Court's decision appears in the judgment of Lord Morison, who said (1): " In this case there are the two sets of documents, namely, the missives which are dated contemporaneously and which are part and parcel, in my opinion, of one transaction. It seems to me that the effect of the missives is that the appellant bought a house and a site for it. That is the substance of the transaction, and a consideration of both sets of missives was necessary to ascertain the true consideration of the transaction. The value of the ground was 84*l.*, and that was the consideration which the appellant gave for it. The value of the house was 630*l.* It seems to me, therefore, that it is impossible to hold that this conveyance, which carries the right both to the site and to the house, is properly stamped with a stamp which covers only the price of the site. I think that the production of the missives is also a conclusive answer to the argument that was based on s. 10 of the 1900 Act. If it was a house on the site that was bought by the appellant, it seems quite clear that s. 10 has no application."

That seems to me to show the distinction which exists between the present case and that case, which was undoubtedly one of some difficulty. A complication arose there by reason of the fact that the company, James Y. Keanie, Ld., and the vendor of the land, Mr. Keanie, were separate entities. I think that the judgment of Lord Morison makes it reasonably clear that the Court, attaching weight to the circumstance that the house was on the site when the feu-contract was executed, felt able to take the view on a survey of the whole matter that the substance of it was that it was a sale, not of a site, but of a house together with the site on which it was built. That, in my opinion, distinguishes that case from the present.

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(1) 1934 S. C. 432.

I would add that the passage from Lord Morison's judgment which I have read justifies, in my view, the observation which I made earlier, that s. 10 of the Finance Act, 1900, supports the appellants' argument in the present case. That section reads as follows: "A conveyance on sale made for any consideration in respect whereof it is chargeable with ad valorem duty, and in further consideration of a covenant by the purchaser to make, or of his having previously made, any substantial improvement of or addition to the property conveyed to him, or of any covenant relating to the subject-matter of the conveyance, is not chargeable, and shall be deemed not to have been chargeable, with any duty in respect of such further consideration." No doubt that section relates directly to the ordinary case where the purchaser has, as it were, gone elsewhere for the contract to improve the land, but I am not satisfied that it could not apply to such a case as the present, and I observe that the Inner House in *M'Innes* v. *Inland Revenue* (1), in disposing of s. 10 of the above Act, relied on the circumstance that the sale was that of a house, and that, therefore, the section could have no application. In the present case there is room on the facts for the application of the section, and in my opinion, that consideration, particularly in the light of the judgments in *M'Innes'* case (1) reinforces the arguments on behalf of the appellants. The substance of the view taken by the Inner House seems to me to be that the whole could be regarded as one transaction and that consequently it became apparent

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that the reality of the thing was that it was the sale of a house. Comparing the present case, it is impossible, for the reasons I have already stated fully, on the facts of the present case, to say that the transaction was in reality one for the sale of a house. The house did not exist at the time of the conveyance.

An alternative view has been put forward that the conveyance should be stamped in respect of the 500*l.* with the addition of the value of what was in fact on the land at the time. That view cannot be right because it depends on the accidental circumstance that the building company, no doubt having confidence in its client, had gone on to the land and begun to build before it had actually been contemplated that it should do so. I think it is clear that what was contemplated was the sale of the site and then the erection of a building on it, and I do not think the position can be affected by the fact that by something in the nature of an accident there was a partially completed erection on the site at the date of completion.

I have been told that this is in the nature of a test case. The difficulty is that these cases must to a certain extent depend on their facts, and that the facts in any other case are not likely to be exactly the same as those in this case. The substance of the matter has to be looked at, and in order to determine whether the reality of it is a contract for the sale of a house, it has to be ascertained whether the transaction is really all one. If it were, the argument for the Crown would be right. But I accept the view that there were two distinct contracts, and two quite distinct transactions, one conditional on the other. The conveyance representing one of those transactions is in my opinion stampable only with reference to the consideration, 500*l.*, which relates to that transaction, the sale of the land. The appeal must accordingly be allowed.

Appeal allowed.

Solicitors for appellants: *Kimbers, Williams, Sweetland & Stinson.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

NOTTINGHAMSHIRE COUNTY COUNCIL (Appellants) *v.* MIDDLESEX COUNTY COUNCIL (Respondents).

1935
Oct. 25.

Poor Law—Settlement—Renting a Tenement—Rent " not less than ten pounds "—Weekly Tenancy—Poor Law Act, 1930 (20 *Geo.* 5, *c.* 17), *ss.* 84, 89.

The Poor Law Act, 1930, s. 89, provides that " if any person—(*a*) rents, and by virtue of the renting occupies for a whole year, a tenement in any county or county borough consisting of a separate and distinct dwelling-house or building, or of land, or of both, at a rent of not less than ten pounds," then (subject to the further conditions therein contained) " he shall thereby acquire a settlement in the county or county borough " :—

Held, that in order to satisfy the terms of this section the tenancy must be a yearly tenancy, and that therefore a person who rented or occupied a house for a period longer than a year upon a weekly tenancy did not acquire a settlement under the section. In this respect the section has made no alteration in the law as it was before 1930.

Case stated by the appellants and respondents under Baines' Act, 1849 (12 & 13 Vict. c. 45), s. 11.

This case, so far as material, was as follows: George Edwin Morgan (hereinafter called the " poor person ") was the occupier of and resided in a tenement consisting of a separate and distinct dwelling-house known as No. 41, Derby Road, Stapleford, in the county of Nottingham, from March 14, 1932, to June 18, 1934, as a tenant from week to week. The rent of the said dwelling-house was 18*s*. per week (equivalent to 46*l*. 8*s*. per year) payable weekly in advance and the tenancy was at all times terminable by either the landlord or the tenant by one week's notice in that behalf. The poor person himself paid the rent during the tenancy, and also was assessed to and paid the rates in respect of the dwelling-house from March 10, 1932, to March 31, 1934. In September, 1934, the poor person became chargeable to the county of Middlesex. On September 21, 1934, two justices for the county of Middlesex ordered the poor person to be removed to the county of Nottingham.

The grounds alleged for the removal were that the poor person had resided at No. 41, Derby Road, Stapleford, and other places in the county of Nottingham in such manner and circumstances as to be settled therein by renting and rating. On October 29, 1934, the Nottingham County Council gave notice of appeal against this order to the court of Quarter Sessions.

The grounds of the appeal were that the poor person had not acquired a settlement in the county of Nottingham by renting and rating.

The Poor Law Act, 1930, s. 89, is as follows:—

"If any person—(*a*) rents, and by virtue of the renting occupies for a whole year, a tenement in any county or county borough consisting of a separate and distinct dwelling-house or building, or of land, or of both, at a rent of not less than ten pounds; and (*b*) himself pays the rent or at least ten pounds thereof; and (*c*) is assessed to and pays the general rate in respect of that tenement for one year; and (*d*) resides in the county or county borough for forty days, he shall thereby acquire a settlement in the county or county borough."

The question for the opinion of the Court was whether by reason of the above facts and by virtue of the Poor Law Act, 1930, s. 89, the poor person was or was not settled in the county of Nottingham for the purpose of the Poor Law Act, 1930.

P. E. Sandlands K.C. and *H. W. Wightwick* for the appellants. The combined effect of the Poor Relief Act, 1662, s. 1, the Poor Relief (Settlement) Act, 1825, s. 2, and the Poor Relief (Settlement) Act, 1831, s. 1, was that, in order to acquire a settlement by renting and rating property in a parish, the following essentials were required:—

(1.) That a separate tenement should have been occupied for one whole year at least; (2.) that the rental should be 10*l*. a year at least; and (3.) that the term should be one whole year at least.

Those statutes only applied so as to confer a settlement where the parties originally contemplated that the holding would endure for a year, although it might be terminated before the end of the year: *Hastings Union Guardians* v. *St. James, Clerkenwell, Guardians* (1) and *Reg.* v. *Guardians of Norwich Incorporation.* (2)

By the Poor Law Act, 1927, the unit was altered from the parish to the county, and the poor rate was altered to the general rate. The Poor Law Act, 1930, which was a consolidating Act, has not altered the law under the earlier Acts as to settlement by renting and rating. The Poor Law Act, 1930, s. 84, sub-s. 2 (*b*), enables a person to acquire a settlement by renting a tenement. By s. 89, such a settlement is acquired if he " (*a*) rents, and by virtue of the renting occupies for a whole year, a tenement in any county or county borough consisting of a separate and distinct dwelling-house . . . . at a rent of not less than ten pounds"; and (*b*) "himself pays the rent or at least ten pounds thereof."

If the words " rent " in s. 89 (*a*) merely meant " pays rent," then sub-s. (*b*) would be superfluous. The word " rents " must mean " enters into a contract to pay rent." Similarly, the words " by virtue of the renting " must mean " by virtue of the contract of tenancy."

The occupation must therefore be for a year by virtue of the contract of tenancy. The addition of the words " for a year " at the end of s. 89 (*a*) would have added nothing to the meaning. The justices here were mistaken in their interpretation of the section and the order should be discharged.

The tenancy was only a weekly tenancy, and therefore although the poor person has occupied for a year, his occupation was not " by virtue of the renting," but by virtue of successive rentings, each for a week.

Vernon Gattie for the respondents. The object of the Poor Law Act, 1930, was to simplify the existing system. The word " rents " in s. 89 simply means " has a hiring agreement." The words " by virtue of the renting " in s. 89 (*a*) are not to be found in previous statutes, and the words " ten pounds a year " which appeared in the Poor Relief (Settlement) Act, 1825, s. 2, are now omitted. The requirement of a "rent of not less than 10*l.*" may mean for any period in respect of which that rent is paid."

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(1) (1865) L. R. 1 Q. B. 38. (2) (1874) 38 J. P. 677; 30 L. T. 704.

[HUMPHREYS J. The words "for a year" may have been expressly excluded in order to avoid the need for construing the exact meaning of a "tenancy for a year."]

No reply was called for.

LORD HEWART C.J. This appeal ought to succeed. The question is whether upon the facts set out in the case a poor person has acquired a settlement in the county of Nottinghamshire by renting and rating. Before the legislation of 1930 the combined result of the Poor Relief Act, 1662, the Poor Relief (Settlement) Act, 1825, and the Poor Relief (Settlement) Act, 1831, was that, in order to acquire a settlement by renting and rating a tenement, two conditions had to be fulfilled: firstly, that the hiring should be for not less than the whole term of a year; secondly, that it must be occupation by the person hiring for a like term. When the Poor Law Act, 1930, a consolidating Act, came to be framed, those two provisions seem to me clearly to have been put into one sub-section—s. 89—" If any person—(*a*) rents, and by virtue of the renting occupies for a whole year, a tenement in any county or county borough consisting of a separate and distinct dwelling-house or building, or of land, or of both, at a rent of not less than ten pounds . . . . he shall thereby acquire a settlement." Those words, by themselves, seem to me to be perfectly clear. The words "at a rent of not less than ten pounds" clearly refer back to "rents." So two conditions have still to be fulfilled: to acquire a settlement a person of this kind must rent at a rent of not less than 10*l.* and "by virtue of that renting" he must occupy for a whole year. It seems to me that those words "rents . . . . at a rent of not less than ten pounds" and "by virtue of the renting occupies," not, "for twelve months" but "for a whole year," are conclusive. It is said that we do not have the words at the end of the sentence "at a rent of not less than ten pounds for a year." Those words are to be collected from the previous expression "by virtue of the renting occupies for a whole year . . . . at a rent of not less than ten pounds." I think it would be mere surplusage to say "occupies for a whole year at a rental of not less than ten pounds a year." I see no reason for thinking that there was any intention in this part of the Poor Law Act, 1930, to alter the previous and existing law. It could not be altered without plain words, and these words, so far from being plain in favour of the view that an alteration was made, seem to me plainly to show that no alteration was intended. I think therefore that this appeal must be allowed.

HUMPHREYS J. I agree with my Lord. The fact that the law up to the passing of this Act of 1930, or the Act of which it is virtually a repetition, was one which required a yearly letting is an important matter, because Mr. Gattie has argued that by s. 89 of the Poor Law Act, 1930, it was intended to alter the law. If the law which had existed for a very great many years was to be altered, one might reasonably expect that it would be altered in plain and unambiguous terms. The highest at which Mr. Gattie puts his case is that this section may mean, when it uses the word "rents," rents for any time. There are two further difficulties in his way. Firstly, I doubt whether a person who rents on a weekly renting can be said to occupy that tenement by virtue of that renting "for a year." The second difficulty, which I think is a greater one, is the existence of the words at the end of the sub-section "at a rent of not less than ten pounds." I understand Mr. Gattie to concede that if that means "at a rent of not less than ten pounds a year" then his argument could not prevail. But I cannot imagine that this legislation, which is a Poor Law Act, dealing with poor persons who may acquire residence, and so forth, in particular ways, could have been intended to deal with any other than a letting of a tenement at 10*l*. a year. To provide for the case of a poor person who occupies a house at a rental of 10*l.* a week would be ridiculous.

Therefore I agree that the appeal should succeed.

SINGLETON J. I agree, and I desire to add only a few words. It is to be borne in mind that the Poor Law Act, 1930, following the Poor Law Act, 1927, is a consolidating enactment. Further, the matter with which we are dealing is the acquisition of a settlement by renting of a tenement, and nothing else. There is no doubt as to the old law; and unless there are clear words altering the old law we ought not to regard it as altered. My first impression on reading s. 89 was that there had been an alteration in the law. I am satisfied by the argument that there has been no such change in the law. The section must be read, as Mr. Gattie says, as a whole, and he agreed in the course of his argument that if the words in s. 89 (*a*), "at a rent of not less than ten pounds," are to be read as meaning "at a rent of not less than ten pounds a year" his argument fails. I think the true reading of that sub-section must be; "If any person rents at a rent of not less than ten pounds a year." Furthermore, the acquisition of a settlement of this kind is not achieved merely by renting at a rent of not less than 10*l.* a year, but this further is necessary: "and by virtue of the renting occupies for a whole year." It seems to me that the weekly tenant who stays for a year does not occupy for a whole year by virtue of the renting: he occupies for a whole year by reason of the fact and by virtue of the fact that he pays his rent week by week as it is due.

For these reasons I agree with the judgments which have been delivered.

Appeal allowed.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for K. Tweedale Meaby, Clerk to Notts County Council.*

Solicitor for the respondents: *C. W. Radcliffe.*

F. P. F.

ANKERS *v.* BARTLETT.

1935
Nov. 5.

Gaming — Refreshment house — Game involving skill — Lawful game — Played for money — Metropolitan Police Act, 1839 (2 & 3 *Vict. c.* 47), *s.* 44.

The Metropolitan Police Act, 1839, s. 44, provides: "And whereas it is expedient that the provisions made by law for preventing disorderly conduct in the houses of licensed victuallers be extended to other houses of public resort: Be it enacted, that every person who shall have or keep any house, shop, room, or place of public resort within the metropolitan police district wherein provisions, liquors, or refreshments of any kind shall be sold or consumed, ... and who shall . . . . knowingly suffer any unlawful games or any gaming whatsoever therein . . . . shall . . . . be liable to a penalty. . . . . ":—

Held, that in that section the word "gaming" includes the playing of any game played for money or money's worth, whether the game be lawful or unlawful and whether it involves or does not involve skill.

Patten v. *Rhymer* (1860) 3 El. & El. 1; and *Dyson* v. *Mason* (1889) 22 Q. B. D. 351, applied.

CASE stated by quarter sessions for the county of Middlesex.

Mr. S. Ankers, hereinafter called "the defendant," was the keeper of premises at Staines, Middlesex, which were kept by him as a place wherein refreshments were sold and consumed within the meaning of the Metropolitan Police Act, 1839, s. 44. (1)

There was upon the premises an automatic machine upon which customers played. The players placed two pence in the slot which set in motion a crane situated over a number of articles such as electric torches, ash trays and pencil cases, which were on the floor of the machine. The crane was fitted with miniature grappling irons which descended, opened as they descended, closed on reaching the floor of the machine, and were then drawn up again. If the grappling iron seized and retained hold of an article on the floor of the machine, it was ejected from a slot and was won as a prize by the player; otherwise the player lost his money. The machine

(1) The section, so far as material, is set out in the headnote.

was fitted with a handle, by moving which before the insertion of the 2*d*. in the slot the position of the crane in the machine could be altered, so that it was suspended over the back, the centre, or the front of the machine. After the insertion of the 2*d*. and the setting in motion of the crane, the player had no means of influencing the movement of the crane.

On September 24, 1934, two persons were observed by police officers while playing on the machine, and on October 4, 1934, two other persons were so observed. On none of these occasions was the handle used by the players, and on no occasion was any prize won.

On November 27, 1934, before a court of summary jurisdiction at Feltham, Middlesex, two informations were preferred by police sergeant G. Bartlett, hereinafter called "the informant," against the defendant for that he on September 24, 1934, and October 4, 1934, respectively, at Staines, being the keeper of the said premises, did knowingly suffer gaming therein contrary to s. 44 of the Act of 1839; and the defendant was convicted and fined on each information.

The defendant appealed from these convictions to the above mentioned quarter sessions.

On January 23, 1935, the appeals were heard by the quarter sessions.

At the hearing of the appeals the service manager of the company which produced the machine was called as a witness for the defendant, and he demonstrated the working of the machine to the court, and gave evidence tending to show that the game played by means of it involved some degree of skill.

On the part of the defendant it was contended: (*a*) that the playing on the machine was not gaming within the meaning of s. 44, (*b*) that the playing on the machine in the said premises was lawful, (*c*) that skill was involved in the playing of the machine, (*d*) that s. 44 did not make the playing of a lawful game unlawful when played in a place to which the section applied, (*e*) that cases decided under the Licensing Act were not applicable to places where refreshments were sold, because the questions of public policy were different, and (*f*) that if skill was involved in playing on the machine, no offence was committed.

On the part of the informant it was contended: (*a*) that playing on the machine was gaming within s. 44, (*b*) that for the purpose of the offence charged it was immaterial whether or not any skill was involved in playing on the machine, (*c*) that decisions upon similar sections in the Licensing Acts were relevant and applicable to the construction of s. 44, and (*d*) that where a game is played for money or money's worth upon premises within s. 44 an offence is committed within that section.

The quarter sessions found as a fact by a majority that to operate the machine imported skill, and that therefore, following the principle of *Davis* v. *Parker* (1) the defendant was not liable under s. 44; and they accordingly allowed the appeals and quashed the convictions.

The question for the High Court was whether the quarter sessions were right in their determination.

Vernon Gattie for the informant, appellant. The decision of quarter sessions quashing the decision of the court of summary jurisdiction was wrong.

The defendant was charged under s. 44 of the Metropolitan Police Act, 1839, which makes it an offence for the keeper of any place of public resort knowingly to suffer therein "any unlawful games or any gaming whatsoever." Precisely similar words occurred in the statutory form of licence contained in the Schedule to the Alehouse Act, 1828 (9 Geo. 4, c. 61), for the purpose of specifying the kind of games which the licensee must not knowingly suffer on his premises, and in the case of *Patten* v. *Rhymer* (2) it was held that a licensee who suffered persons in his house to play for money a game of cards, which presumably involved some degree of skill, was properly convicted of the offence against his licence of permitting "gaming" on his premises. The same words were used for the same purpose in s. 17, sub-s. 1, of the Licensing Act, 1872, and in *Dyson* v. *Mason* (3) it was held

(1) [1931] 2 K. B. 210.
(2) 3 El. & El. 1.
(3) 22 Q. B. D. 351.

that a licensed person who suffered the playing upon his premises of a game for money which was a game of skill was properly convicted of suffering "gaming" therein. As the words in s. 44 of the Act of 1839 are the same as in these other enactments they must bear the same meaning, and the cases cited therefore show that in that section the word "gaming" includes the playing of any game for money even though it involves some degree of skill. In the present case it is not disputed that the defendant's premises were a place of public resort within the section, and the considerations mentioned show that the carrying on there of the game in question for money or money's worth was gaming within the section even if it involved skill. The quarter sessions were therefore wrong in holding that it was a defence to the charge against the defendant that the game was a game importing skill, and their decision should be set aside and that of the court of first instance restored.

Sir H. Curtis Bennett K.C. (*G. D. Roberts* with him) for the defendant, respondent. The decision of the quarter sessions was right and should be upheld.

By allowing the machine in question to be worked in his premises the defendant did not suffer "gaming" therein within the meaning of s. 44 of the Metropolitan Police Act, 1839. There is reason to believe that since that Act was passed the Legislature has modified its policy in regard to the playing of games in places of public resort. The statutory form of licence in the Schedule to the Alehouse Act, 1828 (9 Geo. 4, c. 61), provided that the licensee should not suffer "any unlawful games or any gaming whatsoever," and s. 44 of the Act of 1839 uses language identical with that which had there been used. But s. 17, sub-s. 1, of the Licensing Act, 1872 (35 & 36 Vict. c. 94), only penalized the carrying on upon the premises of "any gaming or any unlawful game," thus omitting to add after the word "gaming" the word "whatsoever." This change of language would seem to show that at the date of the later enactment it was no longer intended to prohibit every kind of lawful gaming even on licensed premises. However that may be, it cannot be doubted that there is a wide distinction between licensed and unlicensed premises as regards gaming therein. The playing of games on licensed premises encourages drinking and wrangling therein, and for that reason the courts in cases such as those that have been cited on behalf of the informant have construed the term "gaming" in the Licensing Acts as including all games whether lawful or unlawful played for money or money's worth. The playing of games on unlicensed premises cannot however be attended by these consequences, and there is no authority for construing the term "gaming" in an Act relating to premises of that description, such as this Act of 1839, as extending to lawful games even though played for money. In *Davis* v. *Parker* (1) a game involving skill though it was played for money was held to be a lawful game. In *Bracchi Brothers* v. *Rees* (2) a game which was found to be a game of chance was held to be an unlawful game within the meaning of the Refreshment Houses Act, 1860 (23 Vict. c. 27), s. 32, but that case seems plainly to imply that if the game had involved skill it would have been held lawful. The game played on the respondent's premises has been found as a fact to import skill and was therefore in itself a lawful game, and the respondent by allowing it to be played there could not be convicted under the section now in question of suffering an "unlawful game" in his premises. In view of these considerations the respondent did not suffer "gaming" in his premises within the meaning of the section in question, according to the modified construction which it is submitted that that term ought to receive in a case relating to unlicensed premises.

LORD HEWART C.J. In my opinion it is clear that this appeal should be allowed. The justices in quarter sessions found as a fact by a majority that the working of the machine referred to involved substantial skill, and applying to this case the principle of the decision in *Davis* v. *Parker* (1) they held that therefore the defendant was not liable under s. 44 of the Metropolitan Police Act, 1839. I cannot but think

(1) [1931] 2 K. B. 210.

(2) (1915) 79 J. P. 479.

that the justices in so doing directed their minds to the wrong question. The question was not whether the working of this machine involved skill, but whether it was "gaming" within the meaning of s. 44 of the Act of 1839. The language there used is that the keeper of a place of public resort who shall "knowingly suffer any unlawful games or any gaming whatsoever" shall be liable to a penalty, and, unless one is to suppose that the Legislature has enacted a provision which is not merely tautologous but also misleading, the expression "any gaming whatsoever" must go farther than the expresion "unlawful games." It was submitted on behalf of the defendant that there is a difference between licensed houses and unlicensed houses like that here in question as regards the games that may properly be played in them respectively. The opening words of s. 44 make it clear that for the purposes of this Act of 1839 no such distinction can be drawn: they are "And whereas it is expedient that the provisions made by law for preventing disorderly conduct in the houses of licensed victuallers be extended to other houses of public resort: Be it enacted . . . ." In view of those words it seems to me to be nothing to the point to say here that this particular house was not the house of a licensed victualler. If that be so, then the decision in the case of *Dyson* v. *Mason* (1), and also the decision in the case therein referred to of *Patten* v. *Rhymer* (2), appear to me to be very relevant here. In *Dyson* v. *Mason* (1) Wills J. said (3): "It seems to me to have been held, and rightly held, that playing any game for money is gaming." That is a repetition almost in so many words of the remark of Crompton J. in *Patten* v. *Rhymer* (2), where he said (4): "As my brother Wightman J. has pointed out, playing for money is gaming," and in that case Wightman J. had said (4): "The words 'any gaming whatsoever' are wide enough to prohibit gaming of every description." It seems to me that when one looks at the opening words of s. 44 of the Act of 1839 and the decisions in such cases as *Dyson* v. *Mason* (1), it is apparent that the justices in

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(1) 22 Q. B. D. 351.
(2) 3 El. & El. 1.
(3) 22 Q. B. D. 351, 356.
(4) 3 El. & El. 1, 5.

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quarter sessions directed their minds to the wrong question. It is immaterial that the use of this machine requires skill. The quarter sessions having considered the wrong question came to the wrong conclusion.

I think, therefore, that this appeal should be allowed, and that the case should go back to quarter sessions with the direction that their finding was incorrect, that they wrongly quashed the conviction, and that the conviction ought to be restored.

HUMPHREYS J. I am of the same opinion. I would only add that I think that when a case is stated by quarter sessions, it is unsatisfactory to find, as I find here, that they have based a finding upon the argument advanced on the one side and entirely ignored the argument advanced upon the other side. In my view the argument on the part of the informant at quarter sessions was perfectly correct, but, in spite of that fact, the justices of that court say nothing about it in their case. I agree, therefore, in the judgment which has been delivered.

SINGLETON J. I agree.

Appeal allowed.

Solicitors for the appellant: *Wontner & Sons.*
Solicitors for the respondent: *G. B. Howard & Macarthur.*

J. R.

1935
Nov. 8.

LONDON COUNTY COUNCIL *v.* ROYAL ARSENAL CO-OPERATIVE SOCIETY, LIMITED.

Weights and measures—Sale of food—Pre-packed butter—Possession for sale of packages " made up for sale "—Material time of making up—Sale of Food (Weights and Measures) Act, 1926 (16 & 17 *Geo.* 5, *c.* 63), *s.* 4, *sub-s.* 2.

The respondents had in their possession for sale pre-packed packages of butter purporting to be in the quantities prescribed by s. 4, sub-s. 2 (*a*), of the Sale of Food (Weights and Measures) Act, 1926—namely, in multiples of a quarter of a pound, which, however, when weighed by the appellants' food inspector, were deficient in weight. It was contended that as the packages were correct in weight at the time of making up, four days earlier, they were " made up for sale " in the prescribed quantities, and that the offence of having in their possession for sale pre-packed articles of food not being made up in the quantities prescribed by the above sub-section, had not been committed:—

Held, that " made up for sale " does not refer to the moment of making up only but to the moment of having in possession for sale, and that the respondents were guilty of the offence charged.

CASE stated by County of London justices.

At a court of summary jurisdiction sitting at Catford on May 14, 1935, an information was preferred by Alan Charles Ashburner, an inspector of weights and measures of the appellants, the London County Council, against the respondents, the Royal Arsenal Co-operative Society, Ld., under the Sale of Food (Weights and Measures) Act, 1926 (1), for that

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(1) Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. 5, c. 63), s. 4, sub-s. 1: " A person shall not sell any article [which by Sch. I., Part II., includes butter] . . . . otherwise than by net weight except that, in the case . . . . where the article is weighed for sale in a wrapper or container the weight purported to be sold may include the weight of the wrapper or container if the weight of the wrapper or container does not exceed " certain specified proportions of the weight sold.

Sub-s. 2: " A person shall not sell or have in his possession for sale any pre-packed article of food [including butter] . . . . unless (*a*) the article is made up for sale in quantities of two ounces, or . . . . in multiples of half a pound up to a limit of four pounds . . . . ; and (*b*) the wrapper or container bears thereon, or on a label securely attached thereto, a true statement in plain characters of the minimum net weight of the article contained therein, or, in any case where the weight of the wrapper or container is permitted the respondents on March 22, 1935, at 50 Rushey Green, Catford, did unlawfully have in their possession for sale pre-packed articles of food, to wit, 113 packages of butter, the said butter not being made up in the quantities prescribed by s. 4, sub-s. 2, of the said Act.

Upon the hearing of the information the following facts were proved or admitted: The said Ashburner entered the respondents' said shop on March 22, 1935. Behind the provision counter were a number of boxes of pre-packed butter, one of which contained 77 packages of fresh butter, each package being marked "½ lb. net." Ashburner weighed every package in this box. Each was deficient of the marked weight to an amount ranging from 2 drams to 7 drams. The total deficiency on the 77 packages was 20 ozs. 14 drams, an average of 4·3 drams per package, being 3·3 per cent. of the marked weight. There were also five other boxes containing packages of salt butter each marked "½ lb. net." From each of three of these boxes Ashburner weighed twelve packages. Each was deficient of the marked weight to an amount varying from 4½ drams to 1 dram. The total deficiency on the 36 packages was 6 ozs. 4½ drams, an average of 2·79 drams per package, being 2·1 per cent. of the stated weight.

The manager of the said shop alleged that all the packages

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by the preceding sub-section to be included in the weight purported to be sold, of the minimum weight of the article with its wrapper or container: Provided that, in the case where the article is made up for sale on the premises where it is sold or kept for sale by a retailer and is made up in quantities of two ounces, four ounces, eight ounces, one pound, or a multiple of one pound, it shall not be necessary that such a statement as aforesaid should be borne on or attached to the wrapper or container."

Sub-s. 3: "Any such statement as aforesaid shall not be deemed to be untrue if it is shown that it was true at the time of packing or of importation, whichever was the later, and the original wrapper or container has remained intact."

Sect. 12, sub-s. 3: "In any proceedings under this Act in respect of an alleged deficiency in the weight of any article of food delivered to a purchaser, the defendant shall be discharged from the prosecution if he proves to the satisfaction of the court that the alleged deficiency was due to unavoidable evaporation or drainage and that due care and precaution had been taken to avoid such deficiency."

had been weighed on March 18, 1935, by the respondents' staff at the said shop. Ashburner tested the respondents' scales and found them in order.

On the part of the respondents it was contended that it was not proved that the said packages of butter were made up for sale in quantities other than the quantities prescribed by s. 4, sub-s. 2, of the Act of 1926 (1), and that the alleged deficiencies of weight were not evidence of any offence under the said sub-section.

On the part of the appellants it was contended that on the above facts the respondents were proved to have had in their possession a pre-packed article of food which was made up for sale in quantities not in accordance with s. 4, sub-s. 2 (*a*) (1), of the said Act, and that s. 4, sub-s. 2 (*a*), of the said Act was applicable to cases where a person had in his possession a pre-packed article of food which was deficient in weight.

The justices were of opinion that s. 4, sub-s. 2 (*a*), of the Act does not deal with the subject of deficiency of weight, but only prescribes the units in which (inter alia) pre-packed butter is to be made up for sale; that the expression "made up for sale" used in the sub-section refers to the act of putting the article in its package ready for sale, and to the time when that act is performed; that the prosecution had not proved that the butter was not made up for sale in those quantities, as the fact that some of the packages were deficient of those quantities at the time of inspection by the informant was not sufficient evidence that they had not been made up for sale in those quantities; and that deficiency of weight is a separate offence either under s. 4, sub-s. 2 (*b*), or under s. 3 of the Act of 1926, and was not charged in the information, and accordingly dismissed the information, but stated this case.

Vernon Gattie for the appellants. The justices were wrong in dismissing the information. They appear to have thought that the proceedings should have been brought under s. 4,

(1) See note (1) ante, p. 154.

sub-s. 2 (*b*) (1), which deals with the truth of the statement on the wrapper, or under s. 3, which is concerned with misrepresentations on the sale of articles of food. Under either of these sections a prosecution might well have failed; if under s. 4, sub-s. 2 (*b*), because the proviso to that subsection (1) would be applicable if it appeared that these packages had been made up on the premises. And s. 3 is not appropriate to the having in possession for sale. Sect. 4, sub-s. 2 (*a*), does deal with deficiency in weight—Avory J. in *A. Walkling, Ld.* v. *Robinson* (2) said: " The whole purpose of this legislation was to prevent loaves of bread being sold which were deficient in weight." That was a prosecution under the analogous s. 6 of the Act, dealing with the sale of bread of a net weight of an integral number of pounds. No doubt the learned judge's observation was obiter dictum. Here the respondents were in possession of pre-packed packages which were not made up for sale in the prescribed quantities.

[*Wolfinden* v. *Oliver* (3) was also referred to.]

Glyn-Jones for the respondents. The words " made up for sale " in s. 4, sub-s. 2 (*a*), refer to the time when the packages were originally made up. The mischief against which the Act generally is aimed is the giving of short weight: see s. 1. No one is hurt so long as the packages remain on the shelves of the sellers; the harm is done when they are sold to the public. The respondents would have had no answer to a charge under s. 1, to which section the whole Act is ancillary. The object of s. 4, sub-s. 2 (*a*), in enacting that goods should be made up in the prescribed units has no reference to deficiency of weight, but was merely intended to render the task of inspectors of food easy. It is sufficient if the trader makes up packages which purport to be packages of 2 oz., etc. But by no default of the trader, through, e.g. evaporation, goods may decrease in weight, and the statement attached to the packages may thus become untrue, and the Legislature, recognizing this, has enacted by s. 4, sub-s. 3, that in those circumstances it shall not be deemed to be untrue if it be shown to have been true at the time of packing. No such defence is open where the charge is having in possession for sale packages not made up in the prescribed units, because it would not be relevant thereto unless the contention of the prosecution is correct that the sub-clause deals with deficiency in weight. But that contention is incorrect, because it would be illogical that the defence of evaporation, etc., should not also be available in that case. Selling goods deficient in weight is a more serious offence than having such goods in possession for sale; yet the above defence is available in a case of sale, under s. 12, but, according to the prosecution, not available where possession for sale only is charged. If the view of the justices that s. 4, sub-s. 2, does not deal with deficiency of weight were adopted this anomaly disappears. If charged with attaching a false statement to the packages, the respondents could have set up the defence under s. 4, sub-s. 3; framed as the charge is they are deprived of that defence. It is submitted that it would equally have been an offence to have in possession packages in units which exceeded 2 oz., etc.; if that is so it is clear that s. 4, sub-s. 2 (*a*), is not a section dealing with deficiency of weight. The offence of selling or keeping for sale goods in quantities other than those specified is an offence different in kind from that of selling or keeping for sale goods that are under weight: per Talbot J. in *A. Walkling, Ld.* v. *Robinson.* (1)

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(1) See note (1) ante, p. 154.

(2) (1929) 28 L. G. R. 88, 100.

(3) (1932) 30 L. G. R. 263.

Lord Hewart C.J. This is a case stated by justices of the peace for the County of London, sitting at Catford. It concerns an information preferred by an inspector of weights and measures of the appellants, the London County Council, under the Sale of Food (Weights and Measures) Act, 1926, against the respondents for that they, on March 22 last, at premises in Catford, unlawfully had in their possession for sale pre-packed articles of food—namely, 113 packages of butter, the said butter not being made up in the quantities prescribed by s. 4, sub-s. 2 (2), of the said Act. The justices having heard the information, dismissed the case, and the

(1) 28 L. G. R. 100.

(2) See note (1) ante, p. 154.

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question which is raised by this special case is whether, in so deciding, they came to a correct determination in point of law.

The facts are simple enough. On March 22 of this year, the appellants' inspector went into the respondents' shop and found that there were there, behind the provision counter, a number of boxes of pre-packed butter. One of those boxes contained 77 packages of fresh butter and each of those packages was marked "½ lb. net." The inspector then weighed every package in the box and every one of them was deficient as regards the marked weight to an amount ranging from 7 drams to 2 drams. The total deficiency on the 77 packages was over 20 ozs. There were also at that time five other boxes containing packages of salt butter, each of which was marked "½ lb. net." From each of three of those boxes the inspector weighed twelve packages and every one of those was found to be deficient so far as the marked weight was concerned to an amount ranging from 4½ drams to 1 dram. The total deficiency on these 36 packages was over 6 ozs. The manager of the shop said that all the packages had been weighed on March 18, that is to say, four days before, by the staff of the respondents at that particular shop. Finally, the case finds that the inspector tested the respondents' scales and found that they were in order.

The contention, and apparently the sole contention, which was put forward on behalf of the respondents, was that it was not proved that the packages of butter were made up for sale in quantities other than quantities prescribed by the section, and that the deficiencies in weight were not evidence of any offence. That contention means, when one writes it out in full, that at the time when the packages were made up they were not made up in the wrong quantities.

For the appellants it was contended that the respondents were found to have had in their possession a pre-packed article of food made up for sale in quantities not in accordance with the section, and that the section was applicable to cases where a person had in his possession a pre-packed article of food deficient in weight.

The justices, in expressing their opinion, have gone beyond the contention that was raised, and I will read that opinion from beginning to end: "We were of opinion that s. 4, sub-s. 2 (*a*), of the Act (a breach of the terms of which clause was alleged in the information) does not deal with the subject of deficiency of weight, but only prescribes the units in which (inter alia) pre-packed butter is to be made up for sale; that the expression 'made up for sale' used in cl. (*a*) refers to the act of putting the article in its package ready for sale, and to the time when that act was performed; that the prosecution had not proved that the butter was not made up for sale in those quantities, as the fact that some of the packages were deficient of those quantities at the time of inspection by the informant was not sufficient evidence that they had not been made up for sale in those quantities; and that deficiency of weight is a separate offence under s. 4, sub-s. 2 (*b*), or under s. 3 of the Act, and was not charged in the information."

In my opinion, with all due respect to these justices and to the long and elaborate argument which we have had the advantage of hearing from Mr. Glyn-Jones, this conclusion was entirely wrong. It is too late now to re-consider the scheme and system of this Act, or to call attention to some apparent contradictions or omissions exhibited or suggested by s. 12, which has been inserted for the purpose of protecting traders. This Court has to construe the Act as it is, and it seems to me that, upon the plain words of this section, this offence was committed and the view which found favour with the justices was erroneous.

In my opinion, it is nothing to the purpose to say, with regard to a penal statute, that it may in some circumstances expose an offender to two different kinds of prosecution; nor is it to the purpose to point out that in some circumstances the Act of Parliament has afforded a protection which, in other circumstances, it has refrained from affording. No Act of Parliament is perfect, and it may be that this Act of Parliament has gone to the last possible length in providing protection for the trader. But that is not a reason why this Court should afford further protection.

Here the information was laid under s. 4, sub-s. 2, of the statute. That section provides (inter alia) that a person shall not have in his possession for sale any pre-packed article of food of any of the kinds set forth in the schedule, unless— and then two conditions follow. Now, what is meant by the expression: shall not have in his possession for sale any pre-packed article of food unless it fulfils these conditions? This Act, although it contains s. 12, the marginal note to which is "Safe-guards to traders," is, as its title says, and as its provisions confirm, "An Act to provide for the better protection of the public in relation to the sale of food." It is not content to deal with the offence of selling short weight, nor with the offence of misrepresenting the weight, or other matters in connection with the sale. It contains also precautionary provisions, and one of them is to be found in sub-s. 2 of s. 4: "shall not . . . . have in his possession for sale any pre-packed article of food . . . . unless," and then follow the two conditions. In this Act what is being dealt with is an ordinary sale, and it is a weights and measures Act. In the ordinary course it might be that the particular commodity would be weighed in the presence of the purchaser, but for the convenience of carrying on retail business, shopkeepers may have in their possession articles which are not then to be wrapped up and after that be weighed, but articles which are pre-packed and are supposed to have been weighed beforehand. But traders are not to be protected against prosecution for the offence of giving short weight by the mere fact that the articles were pre-packed and made up beforehand. Accordingly sub-s. 2 (*a*) provides that the person shall not have in his possession for sale any pre-packed article of food unless it is made up for sale in quantities which are named therein.

Now, what does "made up" mean? It seems to me that it would be fantastic to hold that what is there being referred to is the moment of making up. The person who is being protected is the buyer. Of what satisfaction is it to a man who has been sold an article which is three ounces short of the purported weight to be assured that at the moment when it

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was weighed in the packing warehouse of the wholesale dealer it was quite correct ? In my opinion, on the clear meaning of the words, reinforced by the obvious purpose of this Act, the words " shall not . . . . have in his possession for sale any pre-packed article of food . . . . unless (*a*) the article is made up for sale in quantities of two ounces, etc.," means that the test is to be applied at any moment of its being in his possession, and on a charge under s. 4, sub-s. 2 (*a*), of having an article in his possession for sale which is apparently made up in these quantities, then if it is not accurately made up in these quantities, the offence is committed.

It is quite true that two conditions are provided by sub-s. 2, and the pre-packed article is not to be in possession for sale unless each of these two conditions is fulfilled. Those conditions are not disjointed ; the word which unites them is " and." By the first condition (*a*) the article is to be made up in what may be called the prescribed quantity, and by the second (*b*) the wrapper or container of the pre-packed article must bear a true statement in plain characters of the net weight. Then follows a proviso in reference to the small shopkeeper or retailer who makes up the article for sale upon the premises. Sub-s. 3 provides that the statement upon the wrapper or container shall not be deemed to be untrue if it is shown to have been true at the time of packing or importation, whichever was the later, and the original wrapper or container has remained intact. The Act is intelligible, though perhaps hard to explain ; but we have to construe it as it is.

The argument has been presented to us in the form of a reductio ad absurdum. It is said that two conditions are required to be fulfilled, but with regard to the second requirement, namely, as to the truth of the statement, the seller is protected in a particular case if the statement was true at the time of packing or importation, and that it is illogical that protection under the second limb should be given if liability still remains under the first limb. I have tried hard to follow that argument, but I entirely fail to do so. The requirement that the pre-packed article shall be of the regular or prescribed weight remains, but as far as the statement is concerned, that additional requirement is foregone in a particular case. I cannot understand the argument that because relief is given in certain circumstances with reference to the second condition, relief therefore should be given with reference to the first condition. And it is to be observed that if the statement were not so protected by s. 4, sub-s. 3, the making of an untrue statement would be a quite separate offence under s. 2 and s. 3.

It seems to me that the plain meaning of this section is that a person is not to have in his possession for sale a pre-packed article of food unless the article then and there is in a condition of being made up for sale in the proper quantity, and not that it was made up last month or the month before and that it was all right when it was made up. The trader has it in his possession pre-packed and made up in a certain way, and if he has it in his possession when it does not satisfy the requirement as to prescribed weight, he has committed an offence.

An argument has been suggested that if the broader—I will not say looser—view taken by these justices prevailed, namely, that s. 4, sub-s. 2, has no application to cases of deficiency of weight, the apparent contrast between the case of the purchased article and the article in possession suggested by the provisions of s. 12 would be removed. It is not necessary to speculate upon the reasons why Parliament provides for one thing and not for another. It is quite true that under s. 12, sub-s. 3, in respect of an alleged deficiency in the weight of any article of food delivered to a purchaser, the defendant has an opportunity of proving unavoidable evaporation or drainage and that due care and precaution were taken to avoid such deficiency. The argument is that it is unreasonable that that answer should be contemplated in the case of an alleged deficiency in an article of food delivered to a purchaser while there is no such provision with reference to pre-packed articles in possession for sale. There may be twenty answers to that contention. I can at once think of one. It is one thing to give the tradesman the

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opportunity of proving an excuse in the case of a particular article delivered; it is quite another thing to say that he may have upon his premises ready for sale a whole stock of articles which do not satisfy the requirements as to weight. The Legislature may well have regard, in such a case, to expediency, and find it expedient to offer a defence in one case, which would open a large door to fraud in the other. However that may be, the fact remains that when s. 12, sub-s. 3, was passed, it was limited, and we must take it, deliberately limited, to the case of an article of food delivered to a purchaser.

The justices have held that s. 4, sub-s. 2, does not deal with the subject of deficiency of weight. That seems to be manifestly at variance with the plain words of the section. They have held that "made up for sale" refers to the act of the putting of the article in its package ready for sale at the time when that act was performed. That is true, but it does not refer solely to that time. The article must be made up in the prescribed quantity at any time when it is in possession for sale. Otherwise s. 4, sub-s. 2 (*a*), would have to be read after this fashion: "unless the article *had been* made up for sale in quantities of two ounces"; but it is "unless (*a*) the article *is* made up for sale in quantities of two ounces, etc." Any other construction, it seems to me, would render the provision entirely nugatory. The justices go on to say that the prosecution have not proved that the butter was not made up for sale in those quantities. Of course they have not. Lex non cogit ad impossibilia.

In my opinion, the decision of the justices was in all respects erroneous, and while I pay great attention to the able and exhaustive argument of Mr. Glyn-Jones—and, if he will allow me to say so, it repeats and reinforces all the arguments which I have listened to on behalf of defendants in all the cases which I have heard under this statute—I am of opinion that this appeal must be allowed and the case must go back to the justices with a direction to find that the offence which was charged was proved.

HUMPHREYS J. I agree. I have not myself had occasion to apply my mind to the construction of this statute before to-day; and the cases which have been very shortly referred to in argument are sufficient, I think, to show that in many respects it is not an easy Act to construe. Mr. Glyn-Jones may be right when he says that in some respects the Act appears to be illogical. I express no opinion about whether it is or not; but I think the Court must take refuge, under those circumstances, in the ordinary rule which applies to the construction of statutes, which, as I understand it, is that where the words of the statute are plain, effect must be given to those words. Where the language used appears to be ambiguous, then other matters, including the intention of the framers of the Act in such matters, may properly be the subject of inquiry by the Court.

In this case the Court is asked to construe very short words in s. 4, sub-s. 2, of the Act. It is to be observed, first of all, that s. 1 is quite clear. In general terms it makes it an offence for any person to sell an article of food which is of a less weight, measure, or number than it purports to be. But that is by no means comprehensive, because it is not essential that an article of food should be sold either by weight or by number or by measure. Therefore, in s. 4, Parliament goes on to deal with what has become a very ordinary and common practice among those who sell food by retail, that is, the practice of selling pre-packed articles of food, and Parliament has provided, in s. 4, sub-s. 2, that a person shall not sell pre-packed articles of food of certain kinds unless two conditions are fulfilled. The first is that the article is made up for sale in certain specified units or multiples of those units. Upon that Mr. Glyn-Jones makes this contention. He argues that it is necessary to interpose the word "purporting"; so that he says the real meaning of that section is this: that the article must be made up for sale in quantities purporting to contain two ounces or multiples of two ounces, and so on. I cannot myself find any justification for that argument. If Parliament had intended to say so, I think Parliament would have said so, and I cannot see anything illogical in Parliament saying that articles of

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food, when they are pre-packed, shall be sold, first, in certain definite quantities and not in any other way, and secondly, in packets which contain those quantities. For my own part, I entirely decline to read the word "purporting" into that section. That disposes of the first argument.

Then with regard to the expression "made up." That is, of course, an expression which may be used in one of two different ways. It may refer to the moment when the thing is made up, and it would be true to say of an article, in answer to a question "When was it made up?"? "Oh, it was made up on Wednesday afternoon." It would be equally true to say of an article which was made up then and continued to be made up to-day and is in the same condition: "It is an article which is made up." I think that this section is quite clearly dealing with articles which are in the condition described, that is, made up, at the time when the matter becomes of importance, because they are the subject of an inquiry under this particular sub-section in which the words are used; in other words, at the time when some person is found selling or having in his possession for sale those particular articles.

As against that, Mr. Glyn-Jones has referred us to what he calls instances of want of logic on the part of Parliament. For my own part, I think it much wiser not to inquire into those matters till it is necessary to do so. If I thought that the construction which I have given to this sub-section was a strained construction or anything except a construction which gave the perfectly plain meaning of the words of the Act, then I would proceed to inquire whether there were other sections of the Act which seemed to indicate that some particular construction must be given to this section; but while I respectfully agree with my Lord, that when some of those supposed cases of want of logic are examined there is a good explanation to be found for them, I prefer to base my judgment on this: that in my opinion the two constructions suggested by Mr. Glyn-Jones are the wrong constructions, and as they appear to be the constructions adopted by the magistrates, in my view the magistrates were wrong, and I agree that the result will follow as stated by my Lord.

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SINGLETON J. I am satisfied that the contention of the respondents in the court below as set out in the case is ill founded. I am further satisfied that the finding of the justices as set out in the case cannot be supported. By s. 4, sub-s. 2, of the Act of 1926: "A person shall not sell or have in his possession for sale any pre-packed article of food of any of the kinds set forth in the First Schedule to this Act, unless"—two things occur. The first is "(*a*) the article is made up for sale in quantities of two ounces"—I read no further. It is to be observed that the words are "the article is made up," not "has been made up" but "is made up." Prima facie that must be read as meaning made up at the time of sale or at the time the article is in possession for sale—in this case when it was found there by the inspector. Furthermore, the two things which must be present, which follow the word "unless," in my view must exist at the same time. The second is (*b*): "the wrapper or container bears thereon, or on a label securely attached thereto, a true statement in plain characters of the minimum net weight of the article contained therein." That would mean that the statement, if there were no sub-s. 3 of the section, must be a statement true at the time. It would be no answer, apart from sub-s. 3, to say: "That statement was true at the time it was put on the label or wrapper but is no longer true." The two matters (*a*) and (*b*) must co-exist at the same time, and I am satisfied, myself, that at the time the article is exposed for sale it must be made up for sale in quantities of two ounces, etc. It is not sufficient to say it has been made up at some earlier date.

Mr. Glyn-Jones, in the course of his argument, referred to s. 4, sub-s. 3 (1), and pointed out that that sub-section, on the construction which was sought to be put upon it by the other side, would give an answer to some part of sub-s. 2, but might not to a charge under the other part. I am bound to say, as I said to him in the course of the argument, I think he showed there was something illogical in the framing of the section or of the Act as a whole; but that does not carry him as far as he wishes to go. I cannot for myself see, if there is a statement attached to the article within the meaning of sub-s. 2 (*b*) and that statement is not to be deemed to be untrue by reason of sub-s. 3 if it is shown that it was true at the time of packing or of importation, whichever was the later, and the original wrapper or container remains intact, why that concession should be granted if there is no such concession as to the other part. But it seems to me that that provision—which may have been introduced by way of amendment—does not enable the respondents to get away from the ordinary and natural meaning of the subsection under which they are prosecuted. The ordinary reading is, I think, plain, as has been stated already, and I am of opinion that the justices arrived at a wrong conclusion and that the appeal must be allowed.

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(1) See note (1) ante, p. 154.

Appeal allowed.

Solicitor for appellants: *J. R. Howard Roberts.*
Solicitors for respondents: *W. T. Ricketts & Son.*

W. L. L. B.

Applied. EDLER *v.* AUERBACH. [1949] 2 All E.R. 692.

Dictum of the court, at p. 178, *followed.* YOUNG *v.* RANK. [1950] 2 All E.R. 166.

Applied. EDLER *v.* AUERBACH [1950] 1 K. B. 359

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Oct. 21, 22, 23;
Nov. 25.

[1934. A. 2137.]

Unlawful purpose—Lease and separate agreement—Alleged intention to use documents to deceive Assessment Authority—Enforceability of documents as against tenant—Practice—Judge sitting without a jury asked to rule that no case to be answered—Disapproval of practice.

The principle, that where it appears that the subject-matter of an agreement is intended to be used for an unlawful purpose the Court will refuse to enforce it, applies equally where it is intended to use for the purpose of effecting an unlawful purpose documents containing the terms of an agreement.

Scott v. *Brown, Doering, McNab & Co.* [1892] 2 Q. B. 724 applied.

Statement in Salmond and Winfield's Law of Contracts, p. 152, that "where the illegal purpose has been wholly or partly performed, the law allows no locus pœnitentiæ," approved.

Observations as to the inconvenience of the practice of asking a judge, when sitting without a jury, to rule at the conclusion of the evidence of the party on whom the onus of proof lies, that there is no case to answer.

Decision of du Parcq J. reversed.

APPEAL from du Parcq J.

The facts, which are fully stated in the judgment, were, shortly, as follows:—

In 1929 the defendant, Mrs. Rayson, agreed to take a flat in Piccadilly from the plaintiff at a rent of 1200*l.* a year, which sum was to cover the provision by the plaintiff of certain services. The plaintiff forwarded to her two documents, one being a lease of the flat together with the benefit of certain services at a rent of 450*l.* a year, and the other an agreement for the rendering by the plaintiff of various services in consideration of the payment by her of 750*l.* a year. Except for the provision and maintenance under the agreement of a frigidaire, the services to be provided under the agreement were practically the same as those to be provided under the lease. Both documents were dated October 29, 1929.

The rent, calculated at 1200*l.*, was paid quarterly by the defendant up to and including the instalment falling due at

Midsummer, 1934, but as the plaintiff had failed, as the defendant alleged, to comply with certain of his obligations, she refused to pay the full quarterly instalment falling due on September 29, 1934 (although she tendered the quarter's rent under the lease, namely, 112*l.* 10*s.*, which tender was refused), whereupon the plaintiff issued a writ claiming the full sum of 300*l.*, being the quarter's instalment under the two documents.

By her defence the defendant alleged (1.) that there was no consideration for the agreement to pay the 750*l.* a year, and (2.) that the plaintiff had not performed his obligations and had thereby repudiated the lease and agreement. She pleaded the tender, and subsequently, by leave, amended her defence by adding the following paragraph: "The defendant will object that the said agreement is void for illegality and that its enforcement would be contrary to public policy in that its execution was obtained by the plaintiff for the purposes of defrauding the Westminster City Council by deceiving them as to the true rateable value of the said premises and by inducing them to believe that the true rent received by the plaintiff in respect of the said premises was 450*l.* and by concealing from them the terms of the said agreement."

At the hearing, the onus being on the defendant, her counsel opened, and called witnesses who stated that the flat having been assessed at 720*l.* gross and 597*l.* net, the plaintiff gave notice of objection to the Assessment Committee, and followed that up by stating that the rent of the flat was 450*l.*, inclusive of rent, taxes and services, and that 450*l.* was the only amount he received; that the plaintiff produced the lease and not the agreement to the Assessment Committee, whereupon the gross valuation was reduced from 720*l.* to 270*l.*; but that on the Assessment Committee afterwards discovering the fact of the separate agreement, they restored the original figures of 720*l.* gross and 597*l.* net.

Counsel for the plaintiff asked the judge to rule that, even if the evidence given on behalf of the defendant were accepted, it afforded no answer in law to the plaintiff's claim. After argument on this submission,

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du Parcq J., in the course of his judgment, said that it was impossible not to think on the evidence that had been given that the plaintiff intended to represent to the Assessment Committee that there was no agreement between himself and the defendant except the lease, that he was getting 450*l.* a year from her and no more for the use and occupation of the flat and the services referred to in the lease, and that he showed the lease to the Assessment Committee and concealed, or endeavoured to conceal, from them the existence of the agreement. Upon that Mr. Pritt, for the defendant, said that if an agreement, although legal on the face of it, was entered into for an unlawful purpose it could not be enforced by the guilty party. There was, however, in his Lordship's opinion, no case which decided that where one of the parties to a contract meant to make a misrepresentation to a third person about the document containing the contract, the contract itself or its ulterior purpose was illegal. In the case before him both the lease and the agreement were ex facie legal. The plaintiff could fulfil his part towards the defendant without doing anything wrong. All that could be said was that he intended to take advantage of the peculiar form of the documents to suppress the fact of the agreement and not bring it to the knowledge of a third person. In his view that circumstance was too remote from the contract itself for it to be said that it was illegal or was entered into for an illegal purpose, that purpose being not for something to be done under it, but as to the use of the document in which the contract was recorded. In this case the contract between the two parties could be performed lawfully; there was no suggestion that the plaintiff intended to perform it in an unlawful manner. For those reasons he held that the point as to illegality failed. He also held that there was enough in the agreement which was not in the lease which constituted consideration—namely, the plaintiff's promise to provide a resident porter and to provide a frigidaire. On these points, therefore, he decided in favour of the plaintiff, certain other questions to stand over.

The defendant appealed.

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Pritt K.C. and *C. Gallop* for the appellant. du Parcq J. was wrong in holding that the lease and agreement were enforceable against the appellant. If an agreement is made for an illegal purpose it cannot be sued upon by the guilty party.

[ROMER L.J. In Pollock on Contracts (9th ed.), p. 446, it is said that "an innocent party who discovers the unlawful intention of the other after the contract has been executed is not entitled to treat the transaction as void and resume possession."]

The learned author, it will be observed, cites *Feret* v. *Hill* (1) for that proposition, but he points out in a footnote that in that case "an interest in realty had passed and the re-entry was forcible; but *semble*, the lease was voidable in equity." Here the two documents must be taken together and both are tainted with the intended illegal purpose. If a person makes a contract intending that the subject-matter shall be used for an immoral or illegal purpose the Court will refuse to enforce it: *Cannan* v. *Bryce* (2); *Pearce* v. *Brooks* (3); *Smith* v. *White* (4); *Cowan* v. *Milbourn* (5); *Upfill* v. *Wright*. (6) The nearest case to the present is *Scott* v. *Brown, Doering, McNab & Co.* (7), where Lindley L.J. said (8) in reference to the transaction there in question that "the plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract." Earlier in the same judgment the Lord Justice said: "If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him." In the present case we allege that the respondent's intention was to deceive the Assessment Committee, and in fact it did so for a time, and in those circumstances the Court will not assist him.

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(1) (1854) 15 C. B. 207.
(2) (1819) 3 B. & Ald. 179.
(3) (1866) L. R. 1 Ex. 213.
(4) (1866) L. R. 1 Eq. 626.
(5) (1867) L. R. 2 Ex. 230.
(6) [1911] 1 K. B. 506.
(7) [1892] 2 Q. B. 724.
(8) Ibid. 728, 729.

[*Egerton* v. *Earl Brownlow* (1) and *Gas Light & Coke Co.* v. *Turner* (2) were also referred to.]

Further, we say that there was no consideration for the agreement under which the appellant received practically nothing in the shape of services beyond what she had under the lease.

Micklethwait K.C. and *Granville Sharp* for the respondent. Even on the assumption, which is not admitted, that there was an intention to deceive the Assessment Committee, that does not entitle the appellant to relief from her obligations. The lease is clearly valid, and the only question is as to the agreement, the alleged improper use of which is said to make it unenforceable. The respondent, however, is not obliged to rely on the documents at all: see *Gordon* v. *Chief Commissioner of Metropolitan Police.* (3)

[SCOTT L.J. Were not both documents entered into, so far as the respondent was concerned, for the purpose of effecting an illegal purpose?]

No; but even if it can be said that originally there was an illegal intention that was frustrated almost immediately, and rates having been paid on the larger assessment, the illegal intention cannot now be considered: see *Taylor* v. *Bowers* (4); and the question is whether the Court will refuse to assist the respondent to recover the amount agreed to be paid by the appellant merely because, some years ago, the respondent sought to make use of the agreement for the purpose alleged. It is submitted that the Court will only decline to enforce a contract where there is an existing illegality. [They also referred to *In re Thomas. Jaquess* v. *Thomas.* (5)]

Gallop in reply. With regard to *Taylor* v. *Bowers* (6), it is pointed out in Salmond and Winfield's Law of Contract, p. 152, that "in such cases it is considered that the ends of justice and public policy will best be served by allowing a

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(1) (1853) 4 H. L. C. 1.
(2) (1839) 5 Bing. N. C. 666.
(3) [1910] 2 K. B. 1080.
(4) (1876) 1 Q. B. D. 291, 300.
(5) [1894] 1 Q. B. 747.
(6) 1 Q. B. D. 291.

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party to repent before it is too late, and to prevent the completion of the illegal purpose by reclaiming property delivered or money paid by him in pursuance of it. Where the illegal purpose has been wholly or partly performed, the law allows no locus pœnitentiæ." It is submitted that the law is there correctly stated. Further in Evans's edition of Pothier's Law of Obligations, vol. ii., p. 1, it is said that "wherever an engagement is entered into with a view to contravene the general policy of the law, no form of expression can remove the substantial defect inherent in the nature of the transaction; the law will investigate the real object of the contracting parties, and if that is repugnant to the principles established for the general benefit of society, it will vitiate the most regular instrument which ingenuity can contrive." Again, on p. 6 of the same volume it is stated that "it will be proper to keep it in view as a leading proposition, that an illegality in the object of a contract will frustrate the strictest regularity in form and expression. A sale at an exorbitant price of some article of trifling value is a common cover to a bribe." By analogy, the sale in this case of services at the price of 750*l.*, comes within that statement.

Cur. adv. vult.

Nov. 25. The following judgment of the Court (GREER, ROMER and SCOTT L.JJ.) prepared by ROMER L.J. was read by SCOTT L.J.: Mr. Alexander, the respondent to this appeal, is the owner of a leasehold block of flats at 142, Piccadilly, in the City of Westminster. In July, 1929, the appellant, Mrs. Rayson, approached the respondent with a view to taking an underlease of the flat on the second floor of these premises at a rent of 1200*l.* a year, such rent to cover the provision by the respondent of the services that are usual in such cases. Mr. Alexander accordingly forwarded to Mrs. Rayson two documents, one being a draft lease of the flat at a rent of 450*l.* a year, the other being a draft agreement for the rendering by Mr. Alexander during the term of the lease of various services in connection with the flat in consideration of the payment by her of the additional sum of 750*l*. a year. It is by no means unusual in the case of a lease of a flat to have the actual lease of the premises in one document, and to provide for the rendering of the customary services in another. The strange thing in this case was that the draft lease itself provided for the rendering of such services or, at any rate, the greater part of them, without any payment by Mrs. Rayson other than the rent of 450*l*., and that the agreement provided for the rendering of practically the same services, with some small additions, in consideration of the extra 750*l*. a year. In a later part of this judgment we shall have to compare the services to be provided under the lease with those to be provided under the agreement. For the moment it is sufficient to state that, except for the provision and maintenance under the agreement of a frigidaire, they were substantially the same. In due course the two drafts were approved on behalf of Mrs. Rayson and the engrossments were prepared, executed and exchanged without any suspicion on her part, or on the part of her advisers, that there was anything sinister about the form of the two documents, or that any improper use of them could or was intended to be made of them. The instruments were both dated October 29, 1929, and Mrs. Rayson in due course entered into possession of the flat.

The annual sum of 1200*l*. was paid by Mrs. Rayson quarterly up to and including the instalment falling due at Midsummer, 1934; but, holding the view somewhat strongly that Mr. Alexander had failed to comply with his obligations in respect of the services to be rendered by him under the lease and agreement, she refused to pay him the quarterly instalment of the 750*l*. falling due on September 29 of that year. She tendered to him, however, the sum of 112*l*. 10*s*., being the quarter's rent payable on that day under the lease. This tender was refused by Mr. Alexander, and on October 12, 1934, he issued the writ in this action claiming the full sum of 300*l*. being the quarter's instalment payable under the two documents. By her defence, as originally delivered, Mrs. Rayson contended (I.) that there was no consideration for her agreement to pay the 750*l.* a year, and (2.) that the plaintiff had not performed his obligations under the lease or the agreement and had thereby repudiated them both and was not entitled to maintain the action. In addition she counterclaimed for damages in respect of the plaintiff's alleged failure to observe the covenants and agreements on his part contained in the two documents. She also pleaded the tender of the 112*l.* 10*s.* and brought that sum into Court. The action was in due course set down for trial, but shortly before it came on for hearing the defendant, by leave, amended her defence by adding the following paragraph :—" (2.) (*a*) The defendant will object that the said agreement is void for illegality and that its enforcement would be contrary to public policy in that its execution was obtained by the plaintiff for the purposes of defrauding the Westminster City Council by deceiving them as to the true rateable value of the said premises and by inducing them to believe that the true rent received by the plaintiff in respect of the said premises was 450*l.* and by concealing from them the terms of the said agreement."

If the facts alleged in this paragraph are true, it obviously raises a question of law of both difficulty and importance. Now demurrers have been abolished, but had both parties been willing, or had the Court or a judge on the application of either party so directed, such question of law could have been decided before the trial of the action under Order 25, rule 2. Had the decision upon it been adverse to the defendant, that is to say, had it been decided that, even assuming the facts alleged in the new paragraph to be true, such facts afforded no defence in law, the expense of calling witnesses as to those facts at the trial would have been avoided. This course was not, however, pursued, and the whole action came on for trial before du Parcq J. on May 17, 1935. At the hearing it was contended on behalf of the defendant that, as the onus was upon her of establishing one or more of her defences, she had the right of opening. This contention was acceded to by the learned judge, and the defendant's counsel thereupon opened her case upon the issues (1.) of absence

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of consideration for the agreement of October 29, 1929, and (2.) of illegal purpose, and then called witnesses upon these two points. Her defence and counterclaim based upon the alleged repudiation by the plaintiff of both lease and agreement was not for the moment embarked upon. These witnesses deposed to the following effect: that in the valuation list for the parish of the City of Westminster made in or about January 16, 1930, the flat in question had been assessed at 720*l.* gross and 597*l.* net; that on August 9 following the plaintiff gave notice of objection to such valuation and assessment; that in support of such notice of objection the plaintiff appeared before the Assessment Committee on October 6, 1930; that he then said that the rent of the flat was 450*l.* a year inclusive of rent, taxes and services, and that 450*l.* was the only amount he received in respect of rents, services and rates; that the lease was then produced but the agreement was not; that thereupon the gross valuation of the flat was reduced in the provisional list from 720*l.* to 270*l.*; that enquiry was thereafter made of the defendant on behalf of the valuation authority as to the terms of her tenancy, and that the existence of the agreement of October 29, 1929, was thereupon disclosed by her; that the plaintiff accordingly attended again before the Assessment Committee on November 12, 1930, when, in response to a request for an explanation, he gave a "rather evasive reply"; that on this occasion he contended that the agreement was confidential and that the Committee could not alter their previous decision; that the Committee did, however, alter their previous decision and restored the original figures of 720*l.* gross and 597*l.* net.

Now, if this evidence is to be accepted, it is obvious that the plaintiff attempted to perpetrate a gross fraud upon the rating authorities and through them upon the Inland Revenue. The attempt indeed failed, but only by reason of the disclosure by the defendant at the instance of the Assessment Committee of the agreement of October 29, 1929, the existence of which had been concealed by the plaintiff. The inference is that the plaintiff in causing the defendant's tenancy to be created and constituted by the unusual method that he adopted

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intended by means of that device to perpetrate the fraud. In these circumstances, one would have expected the plaintiff to take the earliest opportunity of going into the witness-box to repel, if he could, the serious charge that had been made against him. This course was not adopted. At the conclusion of the defendant's evidence the plaintiff's counsel submitted that there was no case to answer upon the two issues which at that stage had alone been presented to the Court, that is to say, the issues of no consideration and of illegality. Where an action is being heard by a jury it is, of course, quite usual and often very convenient at the end of the case of the plaintiff, or of the party having the onus of proof, as the defendant had here, for the opposing party to ask for the ruling of the judge whether there is any case to go to the jury, who are the only judges of fact. It also seems to be not unusual in the King's Bench Division to ask for a similar ruling in actions tried by a judge alone. We think, however, that this is highly inconvenient. For the judge in such cases is also the judge of fact, and we cannot think it right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed. Certainly no one would ever dream of asking a jury at the end of a plaintiff's case to say what verdict they would be prepared to give if the defendant called no evidence, and we fail to see why a judge should be asked such a question in cases where he and not a jury is the judge that has to determine the facts. In such cases we venture to think that the responsibility for not calling rebutting evidence should be upon the other party's counsel and upon no one else.

This, however, is by the way; for no one can suggest that, when the defendant's case upon the two issues had been concluded, she did not establish a prima facie case as to the facts on the second issue. Nor, of course, did the plaintiff's counsel make any such suggestion. What he did ask the learned judge to rule was that, accepting the evidence given on the defendant's behalf, there was no case to answer in law. We cannot help regarding this as not only an irregular but a most inconvenient procedure. The witnesses of the plaintiff were presumably in Court and the expense of their attendance had already been incurred. We gather that the learned judge had not, or might not have had, sufficient time at his disposal to proceed with the issue of repudiation; but we cannot find that there would have been any difficulty in completing the evidence upon the other two issues. The learned judge, however, acceded to the request of the plaintiff's counsel and gave a ruling of law upon the evidence as it then stood, deciding the two issues of want of consideration and want of legality in favour of the plaintiff. As the defendant's counsel desired to challenge this decision or ruling in the Court of Appeal, and considered that such an appeal would be one from an interlocutory order, he asked for and obtained from the learned judge leave to appeal. The question not unnaturally arose as to the procedure to be followed after the appeal had been disposed of, and, as we understand, both parties agreed that, if the appeal should succeed, the hearing of the action should be resumed before the learned judge himself in order that the plaintiff's evidence upon the two issues might be given. It seems also to have been agreed that the hearing of the counterclaim should be postponed until after the decision of the Court of Appeal, and that matter will presumably have to be dealt with by the learned judge whatever may be the decision of this Court. A formal order was drawn up in due course and, so far as is material, is in these terms: "The judge having held that the evidence before the Court discloses no defence on the issue of true consideration for the supplemental agreement made between the parties and dated October 29, 1929, or on the issue raised by the defendant in paragraph 2A of the amended defence and counterclaim herein It is ordered that the costs of such issues be taxed and paid by the defendant to the plaintiff. And it is further ordered that there be liberty to appeal and in that event the costs when taxed are to be paid by the defendant to the plaintiff's solicitor within fourteen days of the Taxing Master's certificate on the personal undertaking to return the same if the appeal be successful. And it is further ordered that the trial of the counterclaim do

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stand over and that if notice of appeal be given and entered then there be liberty to apply after the hearing of such appeal." The money in Court was by the order directed to be paid out to the plaintiff or his solicitor. The order, appropriately enough, is headed by the words "New Procedure." So new indeed and so irregular did the procedure seem to us, that when the appeal came on for hearing we thought at first that we ought not to deal with it unless and until the evidence relating to the second issue had been completed. Both parties, however, urged us to hear and dispose of the appeal upon the material before us in order to save expense, and this we ultimately consented to do. The consequences may, however, be unfortunate for the plaintiff. If we allow the appeal, he will, of course, be given the opportunity of proving himself innocent; on the other hand, should we dismiss the appeal, he will be in the position of having been proved in a Court of Justice, by uncontradicted evidence, to be a fraudulent rascal.

It is in such circumstances—and we sincerely trust that the like may never occur again—that we proceed to deal with the two issues that are before us.

The first of these is the question whether there was any consideration for the agreement of October 29, 1929. The defendant contends that there was not, inasmuch as the agreement merely provided for services to be rendered by the plaintiff that he was already bound to render under the lease of the same date, such lease having in fact been executed before the execution of the agreement.

Turning to the agreement, it will be found that the plaintiff thereby expressly agreed (1.) to provide the defendant with a sufficient continuous supply of hot water, (2.) to cause the flat to be sufficiently heated from a central heating plant installed in the building by means of radiators installed in the flat from approximately September 1 until about May 1, dependent upon the outside temperature, (3.) to provide a resident porter on the premises for the convenience of the defendant in common with other tenants, the duties of such porter to include removal of all refuse from the flat and the delivery of coal to the flat from the cellar, (4.) to install in the flat and during the tenancy to maintain a frigidaire for the use of the tenant. The plaintiff also impliedly agreed to pay all rates, taxes, assessments, water, tithe and other payments in respect of the flat, to maintain and keep up the said building and the working of the electric passenger and trade lifts, and the lighting of the halls, corridors and staircases of the plaintiff's premises. By the lease the plaintiff covenanted expressly (1.) to pay the ground rent and all rates, taxes and assessments whatsoever imposed or charged on the demised premises, (2.) to maintain and keep the roof, drains, sewers, main walls, timbers and structure of the building and the entrance hall, passenger lifts, staircases and landings and other parts of the premises intended for the common use of all tenants and occupiers of the said building in good repair and condition and to keep the said entrance hall and staircase and landings well lighted and cleaned, (3.) to provide an adequate supply of hot water for the use of the defendant her family guests and servants at all reasonable times, and also to keep the demised premises suitably and properly heated by means of the central heating apparatus installed therein, and to keep the hot water and central heating apparatus in good and sufficient repair. The plaintiff also impliedly covenanted to employ a porter (though possibly not a resident porter), inasmuch as one of the defendant's covenants required her to have "all coals required brought up from the cellars and all refuse taken down to the dustbin by the porter employed by the lessor." It will be observed that in some respects the obligations undertaken by the lessor under the agreement differed slightly from those undertaken by him under the lease. Why this should have been so, we do not know. The plaintiff may have had some reason for it, but he has not yet been into the witness box to explain the mystery. But it is plain that, except for the provision and maintenance of the frigidaire, the services to be rendered under the agreement are substantially the same as those to be rendered under the lease. If it were not for the frigidaire, therefore, it might well be contended that there was no consideration for the agreement by the defendant to pay the 750*l.* a year in addition to the 450*l.* payable under the lease. The provision and maintenance of the frigidaire does, however, constitute some consideration for the agreement. It certainly would seem to be a somewhat inadequate one, but the Court is not concerned with the adequacy of consideration if consideration there be. In our opinion the learned judge was plainly right in deciding the first of the two issues in favour of the plaintiff.

The second issue raises a question of much greater difficulty.

It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy. The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. Ex turpi causa non oritur actio. The action does not lie because the Court will not lend its help to such a plaintiff. Many instances of this are to be found in the books.

In *Gas Light & Coke Co.* v. *Turner* (1) the plaintiffs had demised certain premises to the defendant to be used by him for an unlawful purpose. It was held that the plaintiffs were not entitled to sue the defendant upon the covenant for rent in the lease. We shall have to refer to this case later upon another point. In *Pearce* v. *Brooks* (2) a coach builder had let out a brougham on hire to a prostitute for the purpose of enabling her (to use the words of Pollock C.B.) " to make a display favourable to her immoral purposes." The coach

(1) 5 Bing. N. C. 666.

(2) L. R. 1 Ex. 213, 217, 218.

builder subsequently sued the prostitute for moneys payable under the agreement. It was held by the Court of Exchequer that he could not recover. "I have always considered it as settled law," said the Chief Baron, "that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied." He added: "Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, ex turpi causa non oritur actio, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other."

In *Cowan* v. *Milbourn* (1) the defendant, who had agreed to let rooms to the plaintiff, discovered subsequently that the plaintiff intended to use them for an unlawful purpose. The defendant thereupon refused to carry out the agreement, and it was held that he was justified in so doing. It was further stated by Bramwell B. that if the defendant had carried out the agreement with knowledge of the plaintiff's unlawful intention and let the plaintiff into possession of the rooms he could not have recovered the price for their letting. This dictum of the learned Baron was, of course, abundantly justified by the decision of the Court of Common Pleas in *Gas Light & Coke Co.'s* case (2) and by the decision of the Court of Exchequer in *Pearce* v. *Brooks* (3), where the brougham had been delivered to the defendant. To the same effect was a decision of the King's Bench Division in *Upfill* v. *Wright*. (4) The plaintiff in that case had let a flat to the defendant whose intention was to use it for an immoral purpose, and this intention was known to the plaintiff. The plaintiff sued for the rent, and it was held that he could not maintain the action.

It will be observed that in all these cases the plaintiff was endeavouring to enforce by action an agreement, or a clause

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(1) L. R. 2 Ex. 230.
(2) 5 Bing. N. C. 666.
(3) L. R. 1 Ex. 213.
(4) [1911] 1 K. B. 506.

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in an agreement, which was tainted by the unlawful intention of the plaintiff, or the unlawful intention of the defendant known to the plaintiff, as to the purpose for which the subject matter of the agreement was to be used. To such an action the maxim, ex turpi causa non oritur actio applies. But the maxim does not require, nor does the language of it suggest, that a completely executed transfer of property, or of an interest in property, made in pursuance of such an agreement must be regarded as being invalid. This is laid down in clear terms in the well-known case of *Feret* v. *Hill.* (1) In that case A. procured B. to grant him a lease of premises by means of a false representation that he intended to carry on a certain lawful trade therein. Having obtained possession, A. converted the premises into a brothel, whereupon B. forcibly expelled him. It was held that A. might maintain ejectment—the fraudulent misrepresentation and the subsequent illegal use of the premises not being sufficient at law to avoid the lease. As the lease had been obtained by fraudulent misrepresentation it could have been set aside in equity, and since the Judicature Act, in any division of the High Court. With that aspect of the matter we are not now concerned. The importance of the case lies in the fact that the lease was held to be a valid one notwithstanding the intention of A. to use the demised premises for an unlawful purpose. On this question Maule J. expressed himself as follows (2): "The plaintiff is not calling upon the Court to enforce any agreement at all. The agreement was an agreement on the part of the defendant to demise certain premises to the plaintiff for a given term. When the instrument was executed, and possession was given under it, it received its full effect: no aid of a court of justice was required to enforce it. This action of ejectment is brought, not for the purpose of enforcing the agreement, but the plaintiff asks the Court to afford him a remedy against one who has extruded him from a lawful possession. There is, therefore, a manifest distinction between this case and those where the Court was called upon to assist the plaintiff in enforcing an agreement the object

(1) 15 C. B. 207.

(2) Ibid. 224.

of which was to do an illegal act, as in *Ritchie* v. *Smith.* (1) In that case both plaintiff and defendant were parties to an agreement, the very object and intention of which was, to enable one of them to commit an infraction of the law. If the Court there had refused to listen to the defence, they would have been helping the plaintiff to enforce something which lay in contract, namely, the payment of rent, when both parties to the agreement were intending to apply the premises to an illegal purpose and the plaintiff was seeking to enforce the performance of an illegal agreement. Such was also the case of *Gas Light & Coke Co.* v. *Turner.*" (2) Crowder J. said much the same thing (3): "He," that is the plaintiff, "is not calling upon the Court to aid him in enforcing or carrying into effect an illegal agreement: all he seeks, is, to recover the possession of premises to which he is lawfully entitled."

This distinction between an action brought to enforce an unlawful agreement and one brought to assert a right of property already acquired under such an agreement is further illustrated by *Taylor* v. *Chester.* (4) The defendant in that case was the keeper of a brothel and as such had supplied wine and supper to the plaintiff "for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch there, to incite them to riotous, disorderly, and immoral conduct." When the debauch was over there followed in due course the reckoning. Being unable or unwilling to pay it at once, the plaintiff deposited with the defendant the half of a 50*l.* note as security. He subsequently repented of this action, and instituted proceedings against the defendant for the purpose of obtaining the return of the half bank note. It was held that he was not entitled to recover. The property in the half note had passed to the defendant, and in spite of the illegality of the agreement under which it had passed, the defendant was entitled to keep it. As was said by Parke B. in *Scarfe* v. *Morgan* (5) in a passage quoted by

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(1) (1848) 6 C. B. 462.

(2) 5 Bing. N. C. 666.

(3) 15 C. B. 227.

(4) (1869) L. R. 4 Q. B. 309.

(5) (1838) 4 M. & W. 270, 281.

Hannen J. in the course of the argument: "if the [illegal] contract is executed, and a property either special or general has passed thereby, the property must remain." The plaintiff, on the other hand, could not maintain his action without asserting and relying upon the unlawful agreement. He could not, to use the language of Mellor J. in delivering the judgment of the Court, recover without showing the true character of the deposit; and that being upon an illegal consideration, to which he himself was a party, he was precluded from obtaining "the assistance of the law" to recover it back.

Much to the same effect is *Gordon* v. *Chief Commissioner of Metropolitan Police.* (1) The money that the plaintiff was claiming in that action had been earned by him in carrying on an illegal business. But the money had become his property and he was held entitled to recover it. He was not asking the Court to enforce any illegal contract or to grant relief dependent in any way on any illegal transaction on his part, but solely on the unjustifiable detention of his money by the defendant.

In view of these various authorities it seems plain that, if the plaintiff had let the flat to the defendant to be used by her for an illegal purpose, he could not have successfully sued her for the rent, but the leasehold interest in the flat purporting to be granted by the lease would nevertheless have been legally vested in her. The result would have been that the defendant would be entitled to remain in possession of the flat without payment of rent until and unless the plaintiff could eject her without having to rely upon the lease or agreement. This curious aspect of the matter was alluded to by Tindal C.J. in *Gas Light & Coke Co.* v. *Turner.* (2) "It was observed," he said (3), "in the course of argument for the plaintiffs, that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of any rent. That point is not now before us; but, without giving any opinion how far the position is maintainable, it is obvious that, if an ejectment should be brought upon the breach of any condition in the lease, the action of ejectment would, at all events, be free from the objection that the Court was lending its aid to *enforce* a contract in violation of law." In the present case the defendant does not, as a matter of fact, desire to remain in possession of the flat. She is, and has for some time been, anxious to leave it. But, if the plaintiff has by his conduct placed himself in the same position in law as though he had let the flat with the intention of its being used for an illegal purpose, he has no one but himself to thank for any loss that he may suffer in consequence.

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(1) [1910] 2 K. B. 1080.
(2) 5 Bing. N. C. 666.
(3) Ibid. 677.

That brings us to the real crux of this case. Has the plaintiff placed himself in that position? Now, in the cases to which we have referred, there was an intention to use the subject-matter of the agreement for an unlawful purpose. In the present case, on the other hand, the plaintiff's intention was merely to make use of the lease and agreement, that is the documents themselves, for an unlawful purpose. Does that make any difference? In our opinion it does not. It seems to us, and it is here that we respectfully disagree with du Parcq J. that the principles applicable to the two cases are identical. That this is so, seems to be established by the decision of this Court in *Scott* v. *Brown, Doering, McNab & Co.* (1) In that case the plaintiff brought an action against some stockbrokers through whom he had purchased shares in a certain company to obtain rescission of the purchase contract and repayment of the purchase money on the ground that the defendants, while acting as the plaintiff's brokers, had delivered their own shares to him instead of purchasing them upon the Stock Exchange. At the trial it appeared from the plaintiff's own evidence that the money sought to be recovered had been paid by the plaintiff in pursuance of an agreement between him and one of the defendants by which such defendant was with the money to purchase upon the Stock Exchange a number of shares in the company at a premium with the sole object of inducing the public to believe that there was a real market for the shares and that they were at a real premium. The object, in other words, was "to rig the market." It was held by this Court, applying the principle ex turpi causa non oritur actio, that the action was based upon an illegal contract and that the money could not be recovered. It will be observed that there was no intention on the part of the plaintiff in that case to use the shares in an unlawful way. The intention was merely to make use of the existence of the share contract in order to defraud the public by inducing them to believe that it recorded a genuine transaction. In delivering judgment Lindley L.J. said this (1): "The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognized and enforced. But his illegal contract confers no rights on him: see *Pearce* v. *Brooks*." (2) It was the transaction of purchase on the market at a particular price and not the thing purchased, of which an illegal use was to be made. So in the present case, it was the formulation of the transaction in a particular way by means of the lease and agreement, and not the subject-matter of the transaction, of which an illegal use was to be made. In one sense, no doubt, it may be said that the plaintiff intended to use only the lease for an unlawful purpose, and not to use, but to conceal, the agreement. In reality there was only one transaction between the parties. The splitting of it up into two documents was a device essential for the success of the plaintiff's fraud and both documents must be regarded as equally fraudulent in purpose.

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(1) [1892] 2 Q. B. 724.

For these reasons we are of opinion that the plaintiff is not entitled to seek the assistance of a court of justice in enforcing either the lease or the agreement. du Parcq J. (who came to a different conclusion) considered that the present case was much the same as one in which a party to an agreement enters into it with the intention of altering it at a later date and using the document so altered for his own fraudulent purposes. " I cannot think," said the learned judge, " that if a man says, ' When I have got this agreement I am going by forgery to alter it,' he is thereby precluded from getting his rights against the other party to the agreement under the agreement in fact made." He thought that in such a case it was something altogether too remote from the contract itself to say that the contract was illegal. In that we respectfully agree with him. But, with all deference, it seems to us that the case he supposed is fundamentally different from the case now before us. In the former case the document is a harmless one, and can only be rendered dangerous by a subsequent act. We see no reason why, before the commission of that act, the document should not be used for an innocent purpose. The intention was mental only and no overt step in carrying out the fraudulent intention was taken in the transaction itself. In the present case, however, the documents themselves were dangerous in the sense that they could be and were intended to be used for a fraudulent purpose, without alteration, and the splitting of the transaction into the two documents was an overt step in carrying out the fraud. We cannot think that the plaintiff is entitled to bring these documents into a court of justice and ask the Court to assist him in carrying them into effect. The plaintiff's counsel contended that this view is inconsistent with the decision in *In re Thomas*. (1) But there is no such inconsistency. In that case one Jaquess had handed over money to Thomas, who was a solicitor, to be used by Thomas in conducting certain litigation. Jaquess subsequently sought to obtain from Thomas an account of the money so handed over to him and a taxation of his bill of costs. Thomas sought to resist the claim on the ground that the money in question had been subscribed by various persons

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(1) [1892] 2 Q. B. 729.

(2) L. R. 1 Ex. 213.

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(1) [1894] 1 Q. B. 747.

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under a champertous and therefore illegal agreement. It is not surprising that he failed in his defence, for, apart altogether from the fact that Thomas was an officer of the Court, a fact upon which the Court commented with some vigour, Thomas could not justify misappropriating the money of Jaquess merely because it had come to Jaquess from a tainted source. Nor, of course, was Jaquess in any way asking the Court to enforce the champertous agreement. In these respects the case is not unlike that of *Gordon* v. *Chief Commissioner of Metropolitan Police.* (1)

Plaintiff's counsel further contended that inasmuch as the plaintiff had failed in his attempted fraud, and could therefore no longer use the documents for an illegal purpose, he was now entitled to sue upon them. The law, it was said, would allow to the plaintiff a locus pœnitentiæ. So, perhaps, it would have done, had the plaintiff repented before attempting to carry his fraud into effect : see *Taylor* v. *Bowers.* (2) But, as it is, the plaintiff's repentance came too late—namely, after he had been found out. Where the illegal purpose has been wholly or partially effected the law allows no locus pœnitentiæ : see Salmond and Winfield's Law of Contract, p. 152. It will not be any the readier to do so when the repentance, as in the present case, is merely due to the frustration by others of the plaintiff's fraudulent purpose.

In our opinion the appeal as to the second issue must be allowed and the order directing payment by the defendant of the costs of that issue should be discharged. It is true that this issue (being the issue raised in paragraph 2A of the defence) goes only to the validity of the agreement. But this, in our opinion, is immaterial. The moment that the attention of the Court is drawn to the illegality attending the execution of the lease, it is bound to take notice of it, whether such illegality be pleaded or not. It had not been pleaded in the case of *Scott* v. *Brown, Doering, McNab & Co.* (3) See, too, the observations of Vaughan Williams L.J. in *Gordon* v. *Chief Commissioner of Metropolitan Police.* (4)

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(1) [1910] 2 K. B. 1080.

(2) 1 Q. B. D. 291.

(3) [1892] 2 Q. B. 724.

(4) [1910] 2 K. B. 1080, 1086.

If, therefore, when the trial is resumed before du Parcq J. the plaintiff should fail to disprove the charge of fraud made against him, his action so far as it is based on the lease and the agreement, should be dismissed. It will, however, apparently still be open to the plaintiff to ask for leave to amend his statement of claim by alleging an oral agreement and claiming relief based upon it. His application for this purpose was ordered by du Parcq J. to stand over until after the hearing of this appeal. But we do not intend to suggest that if and when the application is made it should be granted. It should be added that the defendant seems not unwilling to pay the rent accrued due under the lease. Should she do so the plaintiff is, of course, entitled to retain it. But if he seeks the assistance of the Court to recover it, such assistance must be refused.

On the other hand, if the plaintiff succeeds in clearing himself, the issue of repudiation raised in the defence will have to be decided. In either case the counterclaim will have to be proceeded with. The order of du Parcq J. as to the costs of the issue of want of consideration will, of course, stand. All the other costs of the action and the costs of the counterclaim will be dealt with as the learned judge may direct when the trial is resumed. As to the appeal, the appellant has succeeded upon the more important of the two issues and failed upon the other. In these circumstances we think that the right order to make is that the respondent shall pay the appellant three-quarters of the costs of the appeal.

Appeal allowed; action to be further heard.

Solicitors for appellant: *Lazarus, Son & L. A. Hart.*
Solicitor for respondent: *S. Thornhill Tracey.*

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[1935. O. 1041.]

Damages—Personal Injuries—Trial before Judge without a Jury—Damages awarded by Judge—Appeal on ground that damages excessive—When an award of damages by Judge alone will be reviewed on appeal.

An appeal from a judge trying a case without a jury is a rehearing by the Court of Appeal with regard to all the questions involved in the action, including the question what damages ought to be awarded. But the Court of Appeal will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that the Court of Appeal should be convinced either that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court of Appeal, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

A doctor, in general practice, who was thirty-nine years of age and an athlete, sustained severe injuries in an accident through the negligence of the defendant's servant, the injuries having permanent results which necessitated the doctor employing an assistant to help him carry on his practice and also prevented him from following his athletic career. The doctor brought an action against the defendant to recover damages for his personal injuries, which action was tried by a judge without a jury, and the judge awarded the plaintiff the sum of 10,000*l*. as damages. The defendant appealed against the decision on the ground (inter alia) that the damages were excessive:—

Held, by the Court of Appeal that although if they had tried the case in the first instance they would probably have awarded a smaller sum as damages, yet they would not review the finding of the trial judge as to the amount of damages, as they were not satisfied that the trial judge acted upon a wrong principle of law, or that the amount awarded as damages was so high as to make it an entirely erroneous estimate of the damage to which the plaintiff was entitled.

APPEAL from a decision of Greaves-Lord J. at the Liverpool Assizes on the trial of an action without a jury.

The plaintiff, Cyril Hamilton Owen, was thirty-nine years of age and was a physician and surgeon carrying on a large general practice at Liverpool. The defendant, Frank Sykes, was the owner of a motor coach.

On February 10, 1935, the plaintiff was walking along the covered way which runs between Bridge Street, Warrington, on the one hand, and the yard of the Lion Hotel, Warrington, and the garage and premises in the rear thereof, on the other hand, for the purpose of entering the hotel as a customer by way of the door which opens from the covered way into the hotel, when the defendant's motor coach was driven along the covered way in such a manner as to trap the plaintiff and crush him against the wall at the side of the covered way, causing the plaintiff to sustain very severe injuries.

The plaintiff brought an action against the defendant alleging that the accident was due to the negligence of the defendant or his servant, and claiming damages for the injuries which he had sustained and for the expense, loss and damage to which he had been and would be put. The special damage which he claimed for the expenses to which he had been put amounted to 268*l.* He alleged that by reason of his injuries he would be less able to carry on his practice in the future and unable to earn the income which he would have earned but for his injuries, and that he would be permanently prevented from following his athletic career and activities.

The defendant in his defence alleged that the plaintiff sustained his injuries and damage solely through his own negligence or that his negligence contributed to such injuries and damage.

Evidence was given at the trial that the plaintiff, who previously had been an athlete, was now, owing to the injuries he sustained through the accident, subject to extreme physical fatigue, exhaustion and faintness on the slightest effort; that he had a permanent impairment of breathing powers and permanent limitation of expansion of the left lung, and a permanent increased susceptibility to pulmonary ailments, and that it would be necessary for him to have an assistant in his practice at a cost of 300*l.* or 400*l.* a year.

Greaves-Lord J. held that the accident was caused solely by the negligence of the driver of the motor coach, who did not see the plaintiff at all. He went on to say: But now comes the most difficult part of the whole case, arriving at a proper sum for damages. It is a terrible injury in this case. One has to bear in mind that an assistant for the doctor's practice would probably cost 300*l.* or 400*l.* a year, but as against that the probabilities are that if the plaintiff gets a good assistant it would increase the practice and that to a great extent would help him towards paying the 300*l.* or 400*l.* a year, even allowing for the fact that the plaintiff himself will do less than he has done. That has to be borne in mind. At the same time the two items are substantial; first of all, the cost of an assistant, and secondly, the amount which has to be given in this case not merely for pain and suffering but for the terrible and permanent injury which has been inflicted, because this is not an injury which just causes pain and suffering for a time; it affects the amenities of the man's life for the rest of its duration. An athlete, a strong man, is reduced to a man who will have to live very largely a sheltered life, and have no opportunity of taking part in those sports which have appealed to him and which probably have made him capable of resisting the effects of this accident as he has done. The special damage is, as counsel has said, negligible—about 282*l.* The judgment here must be for something very much in excess of that. I have had to think considerably as to what would be a fair sum, quite apart from the question of liability, and I have come to the conclusion, taking all into consideration, that I could not award a less sum here than 10,000*l.*

The defendant appealed both on the question of liability, and on the ground that damages were excessive.

Lynskey K.C. and *F. E. Pritchard* for the appellant. First, there was no evidence upon which the judge could find that the accident was due to the negligence of the defendant. Secondly, the damages are excessive and this Court ought to review them. An appeal from a judge trying a case without a jury is a rehearing by the Court with

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regard to all the questions involved in the action, including what damages ought to be awarded, and the Court has power itself to assess the damages, the case being different in this respect from a case tried with a jury: see *Reaney* v. *Co-operative Wholesale Society, Ld.* (1); *Flint* v. *Lovell* per Greer L.J. (2) The Court of Appeal will be slow to fetter their discretion with regard to the assessment of damages. Greer L.J. in *Flint* v. *Lovell* (3) laid down the test as to when a Court of Appeal would reverse the finding of a trial judge as to the amount of damages in the following terms: "In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled." The damages awarded by the trial judge in the present case are an entirely erroneous estimate of the damage to which the plaintiff is entitled. The estimate was not a reasonable one. The trial judge attempted to give the plaintiff such a sum by way of damages as to put him in the same position for the rest of his life as he was in before the accident. If the plaintiff has suffered a money loss by reason of the accident it is not right to estimate that loss for the rest of his life and endeavour to compensate him for it by the amount of the damages awarded. Parke B. in directing the jury in *Armsworth* v. *South Eastern Ry. Co.* said (4): "It would be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done .... Scarcely any sum could compensate a labouring man for the loss of a limb, yet you don't in such a case give him enough to maintain him for life." In *Rowley* v. *London & North Western Ry. Co.* Lord Esher, then Brett J., said (5) that the only legal direction to the jury would have been:

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(1) [1932] W. N. 78.
(2) [1935] 1 K. B. 354, 360.
(3) [1935] 1 K. B. 360.
(4) (1847) 11 Jurist, 758, 760.
(5) (1873) L. R. 8 Ex. 221, 231.

"'that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, *under all the circumstances, a fair compensation.*'" Greer L.J. cited with approval those two passages in his judgment in *Rose* v. *Ford* (1) and added: "It is, of course, impossible to award adequate compensation in these cases."

W. Gorman K.C. and *A. M. Hamilton* for the respondent. A Court of Appeal will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. Before a Court of Appeal will interfere with an award of damages by a trial judge the Court will have to be satisfied either that the trial judge has acted upon some wrong principle of law, or that he has awarded such an amount of damages as to make it in the judgment of the Court of Appeal an entirely erroneous estimate of the damage to which the plaintiff was entitled. In the present case neither of those conditions is present.

[He was stopped.]

GREER L.J. This is an appeal from a judgment of Greaves-Lord J. awarding a sum of 10,000*l.* damages in a personal injuries case in which the plaintiff was a doctor and the defendant was the proprietor of a motor char-a-banc or coach.

The accident happened in a covered way adjoining the Lion Hotel in Warrington. The learned judge, as I understand, having seen the witnesses accepted the evidence of the plaintiff as to the way in which the accident happened. According to that evidence the plaintiff, after having placed his motor-car in the yard, was coming with his companion into the covered way in order that he might enter the entrance to the dining room of the hotel where he desired to seek refreshment for himself and his companion. According to his evidence, when coming round what has been called the buttress

(1) Ante, pp. 90, 102.

in the yard and approaching the covered way he first saw the defendant's vehicle beginning to come from Bridge Street into the covered way, and he thereupon started to enter the covered way under the impression, which he got from the way in which the vehicle approached him, that there would be from about two feet to three feet between the side of the covered way in which he was and the vehicle that was advancing towards him, and that if the position had remained as it was there was no risk in his going forward as he did. He went a few paces—he puts it at five paces, but I think he has over estimated the distance which he had got into the covered way—when the approaching vehicle began to turn and crushed him against the wall of the covered way. One thing is quite clear about this case. It is found by the learned judge upon the evidence of the defendant himself that he did not see the plaintiff, notwithstanding that his vehicle had its side lights and its head lights on. That is only reconcilable with the fact of an accident having happened, if he was not keeping a good lookout. It is quite true that he had to keep a good lookout on both sides, because there was, very nearly ahead of him, a lady standing very near a bow window in the yard, and he had to be quite certain that he would not collide with that lady. I think the learned judge was absolutely right in finding that this accident to the plaintiff was due solely to the negligence of the defendant in not keeping a good lookout, and that the allegation of contributory negligence on the part of the plaintiff was also properly rejected by the learned judge, because the plaintiff when he entered the covered way had no reason to suppose that the driver of the approaching vehicle would not keep a good lookout, and that if there was any risk he would turn a little more towards the offside of the covered way, or he would stop his vehicle until the plaintiff had got past. For these reasons I think that we ought not to interfere with the learned judge's finding as regards liability.

But we are faced with a somewhat more difficult question, namely, the question whether we ought to interfere with the learned judge's judgment as to the amount of damages. Now

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the amount of damages found in this case is a very large one, namely, 10,000*l*. An appeal from a decision of a judge trying a case without a jury with regard to damages is a rehearing of the case, and if we are satisfied that the assessment of damages was made on a wrong principle, we ought to reopen the question of damages and ourselves decide what the proper damages should be. It has been laid down in *Flint* v. *Lovell* (1), that this Court does not readily interfere with the estimate of damages made by a learned judge at the trial. An assessment of damages is necessarily an estimate, and an estimate is necessarily a matter of degree, and it seems to me that, unless we come to the conclusion that the learned judge took an erroneous view of the evidence as to the damage suffered by the plaintiff, or made some mistake in giving weight to evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, we ought not to interfere. I cannot help thinking that the damages awarded in this case were on a generous scale. If I had had to estimate them as the trial judge I probably would have arrived at some considerably smaller figure, because one has to have regard not merely to this case but also to other cases which will have to be decided, and not to allow an over-generous estimate of damages to be regarded as an example of the kind of damages that ought to be given in cases of this sort. I again call attention to what Parke B. said in directing the jury in *Armsworth* v. *South Eastern Ry. Co.* (2), and what Brett J. said in *Rowley* v. *London & North Western Ry. Co.* (3), which I referred to in my judgment in *Rose* v. *Ford* (4), as showing that if the learned judge approached the question from the point of view of giving complete compensation to the plaintiff for the injuries he had sustained so as to put him in exactly the same position as he would have been if he had never been injured at all, and to give him what might be considered the price of the injuries which he has sustained in the form of damages, that would be wrong.

I desire to add this: if anything we say in this case were to encourage the idea that unduly large damages can be safely given in cases of personal injuries by a judge trying such a case without a jury, the Court of Appeal has a free hand in dealing with the matter. But I have come to the conclusion after hearing full argument on the question that though if we had tried the case in the first instance, we might have given a smaller sum as damages, we cannot say that the learned judge made an entirely erroneous estimate of the damage to which the plaintiff is entitled.

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(1) [1935] 1 K. B. 354.
(2) 11 Jurist, 758, 760.
(3) L. R. 8 Ex. 221, 231.
(4) Ante, p. 102.

The result of this is that this appeal will be dismissed with costs.

SLESSER L.J. I am of the same opinion and wish only to add a few observations on the second matter which was argued before us, namely, that the damages awarded in this case are such that this Court should revise them by reducing them.

This is a case where the appeal is brought from the decision of a judge assessing damages in a case tried without a jury. There is this difference between a case tried with a jury and a case tried by a judge alone without a jury that, as was decided in the case of *Watt* v. *Watt* (1), this Court has no power without the consent of the parties to alter the damages awarded by a jury when it is of opinion that those damages in law are indefensible, but can only order a new trial in which those damages may be reconsidered. In the case of trials by a judge alone this Court has power, as the hearing is by way of rehearing, to consider the matter and decide what damages ought to be awarded. In the case of an appeal from a judge trying a case without a jury I would accept as a criterion what Greer L.J. states in *Flint* v. *Lovell* (2), where he says: "In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced [either] that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it,

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(1) [1905] A. C. 115.

(2) [1935] 1 K. B. 354, 360.

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in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled." I read those words to mean that if the amount given is an amount which this Court itself might feel disinclined to agree with as an amount which they themselves would assess, that circumstance alone would not necessarily justify this Court in making any amendment of the judge's award, and this Court would normally have to be satisfied that there really was, again to quote the words of Greer L.J., " an entirely erroneous estimate of the damage to which the plaintiff is entitled." That is a question of degree, but I wish to guard against the supposition that because this Court is hearing such a case by way of rehearing, therefore it would be ready to reassess damages according to what this Court, if they had been trying the case, might have given as damages, and not what the judge below gave. It is incumbent, I think, on the parties wishing to disturb the damages awarded to satisfy this Court that the judge had acted upon an erroneous estimate—meaning thereby something in which the error had so tinged the proceedings that it was a proper case for this Court to assess the damages. Otherwise it seems to me a matter of discretion for the learned judge as to his estimate of the damages.

In the present case the damages are more than I would have been willing to award, but they are not so much more that I am prepared to say that there has been an erroneous estimate justifying a reassessment of the damages. I think this appeal fails on damages, not because I do not think that this doctor has been treated with over much generosity, but because I do not think that the estimate is so erroneous as to justify variation.

Scott L.J. I agree with the judgments that have been delivered and with the reasoning on which they are based. I only want to make one observation. In this case there are three elements of damage. The first, which I set aside, is the trivial amount of special damage for expenses incurred. The second is the necessity for employing an assistant, as to which the learned judge had to come to a conclusion as a question of fact and did come to the conclusion that an assistant would be necessary indefinitely throughout the plaintiff's life as a doctor. That involved an estimate in money of the cost of obtaining an assistant and of the amount of compensating good that it would bring to the practice, and generally the questions affecting the net cost, so to speak, to the doctor of being obliged to have an assistant, including in that the drawback of the assistant not being the doctor personally and, therefore, the possibility of some patients discontinuing to be clients of the doctor. The other element is the element of pain and suffering, past, present and future, and of permanent disability and of its extent. All those matters are essentially questions of degree, and in my view the question of the amount to be allowed in respect of the assistant is essentially a question of degree. With regard to all these matters the judge at the trial seems to me necessarily to be in a better position to form an estimate than any Court of Appeal can be.

I only desire to add that on damages, as on other matters where the decision depends on a question of fact and the exercise of the judge's discretion on matters of degree, this Court ought to be very careful not to interfere unnecessarily with the decision of the judge at the trial.

Appeal dismissed.

Solicitors for appellant: *William Charles Crocker, for Wood, Lord & Co., Liverpool.*

Solicitors for respondent: *Vizard, Oldham, Crowder & Cash, for H. J. Sharman, Liverpool.*

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[1935. B. 2757.]

Practice—Setting aside Judgment—Discretion of Judge—Gaming—Racing bets—Alleged promise to pay losses if not declared defaulter—New Agreement to pay—No appearance by Defendant—Judgment by default—Application by Defendant for time in which to pay—Time granted—Subsequent application to set aside Judgment—Approbation and Reprobation—Election—R. S. C., Order XXVII., *r.* 15.

The defendant had betting transactions with the plaintiff, who was a bookmaker, which resulted in the defendant becoming indebted to the plaintiff for the amount of bets lost to him. The plaintiff's agent threatened to declare the defendant a defaulter if he failed to pay the losses, and the defendant, according to the evidence for the plaintiff, thereupon promised to pay if he were not declared a defaulter. Subsequently the plaintiff brought an action against the defendant on this promise to pay. The writ was served personally on the defendant, but he failed to enter an appearance within the stipulated time, and judgment was signed against him by default. In reply to an application by the plaintiff's solicitor for payment of the amount of the judgment the defendant asked for time so that he could make an arrangement to pay, and time was accordingly given to him. Subsequently the defendant entered an appearance to the writ, applied to have the judgment set aside, and for leave to defend. The Master dismissed the application, but the judge in Chambers set aside the judgment and gave leave to defend upon terms. Upon appeal to the Court of Appeal:—

Held, by Slesser and Scott L.JJ. (Greer L.J. dissenting), (1.) that inasmuch as the defendant had after judgment applied for and been granted time within which to pay the amount of the judgment debt, he could not afterwards apply to have the judgment set aside, as that would be to approbate and reprobate; per Scott L.J., as the defendant's action amounted to an election not to apply to set aside the judgment; (2.) that as the relevant facts appeared on the face of the affidavits the judge ought himself to have taken the point notwithstanding that it had not been taken before him.

Per Greer L.J., that the judge in Chambers had a discretion to make the order which he did setting aside the judgment, and that the Court of Appeal ought not to interfere with that exercise of discretion.

Appeal from a decision of Greaves-Lord J. in Chambers.

The defendant, Sir Walter Harry Evans, Bt., had in the year 1931 certain betting transactions with the plaintiff, Bert. Bartlam, trading as a bookmaker at Wolverhampton, which resulted in the defendant becoming indebted to the plaintiff for losses on those betting transactions in the sum of 1241*l.* 11*s.* 9*d.* As the defendant failed to pay this amount the plaintiff on May 13, 1935, lodged a complaint with the National Turf Protection Society, of 23 Pembridge Square, W.2, and authorized the society to take such steps as they might consider necessary, including that of reporting the defendant to the Committee of Tattersalls.

On May 13, 1935, William Ernest Irving, commonly known as A. Harrison Ford, proprietor-secretary of the National Turf Protection Society, had an interview with the defendant at his residence near Wolverhampton and informed him that his default would be reported to Tattersalls. The defendant was extremely anxious that he should not be posted, and said that if Ford would refrain from pressing the claim for a short time he would settle. Ford, according to his affidavit, said he would withhold the case from Tattersalls and relieve the defendant from pressure so long as he was satisfied that the defendant would settle within reasonable time. The defendant gave Ford that assurance and promised to confirm it. Ford put the agreement on record and confirmed it by a letter dated May 16, 1935, which he wrote to the defendant.

As the defendant did not pay the amount claimed by the plaintiff, a writ was issued on July 19, 1935, by which the plaintiff claimed from the defendant the sum of 1241*l.* 11*s.* 9*d.* as being due to the plaintiff under and by virtue of an agreement made on May 13, 1935, between the proprietor-secretary of the National Turf Protection Society acting as the duly authorized agent of the plaintiff and the defendant, alternatively damages for the breach thereof. This writ was served on the defendant personally on September 16, 1935, by the said Harrison Ford.

Judgment in default of appearance by the defendant was signed in the action on September 24, 1935.

On September 24, 1935, the plaintiff's solicitor wrote to the defendant informing him that judgment had been obtained against him for the sum of 1241*l.* 11*s.* 9*d.* together with

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7l. *2s.* costs, and asking for payment of the total amount to obviate the necessity of proceeding on the judgment.

On September 26, 1935, the defendant approached the plaintiff and requested him to ask his solicitor to give the defendant time in which to pay the amount due under the judgment.

On September 26, 1935, the defendant wrote to the plaintiff's solicitor as follows : " I am in receipt of yours of the 24th and note contents. I have seen Mr. Bartlam to-day and explained my position, and he is willing for the matter to stand over so that I can see if I can make any arrangement to pay. I have never refused to pay him but have not had any income to do it with owing to bad trade. He is writing to Mr. Ford to-night. At the moment I have nothing and no assets and know he does not want to lose his money. Yours faithfully, Walter Evans." " P.S. Kindly hold over for me and oblige."

The plaintiff's solicitor replied by letter on September 28, 1935, in which he said at the end : " In all the circumstances I am prepared to let the matter stand over for a further period of seven days, but I must ask you to understand please that, unless at the expiration of that period I receive payment of the total amount due, proceedings will be taken to enforce the judgment without further notice to you."

The defendant entered an appearance to the writ on October 3, 1935, after judgment had been signed, and on the same day took out a summons asking that the judgment signed on September 24 in default of appearance be set aside and that he should be at liberty to defend.

The defendant swore an affidavit in support of the application to set aside the judgment in which he alleged that Mr. Harrison Ford (the agent of the plaintiff) who served the writ upon the defendant on September 16, 1935, told him that it was not necessary for the defendant to take any steps in the action for a month, and that relying upon that statement he did not consult his solicitors until October 2, 1935, the time for entering an appearance having expired on September 23, 1935.

The Master on October 10, 1935, dismissed the application of the defendant to set aside the judgment, and the defendant thereupon appealed to the judge in Chambers.

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The appeal was heard by Greaves-Lord J. sitting in Chambers on October 18, 1935, who allowed the appeal and ordered that the judgment signed on September 24 in default of appearance be set aside, and that the appearance entered on October 3, 1935, should stand subject to the terms that the plaintiff's costs of the appeal and of the application before the Master should be taxed and paid by the defendant to the plaintiff.

The plaintiff appealed to the Court of Appeal.

On October 29, 1935, the defendant swore a further affidavit in which he said that on May 13, 1935, Mr. Harrison Ford came to see him and wanted a definite promise to pay, otherwise he threatened to report the defendant to Tattersalls. The defendant would not give the promise Ford asked for as trade was so bad. The defendant said that if the plaintiff took any action he should be forced to plead the Gaming Act, which he did not wish to do. The defendant denied that there was any such agreement as was alleged by Ford in his affidavit.

Sullivan K.C. and *H. Shanly* for the appellant (the plaintiff). The decision of the judge in Chambers was wrong and the decision of the Master ought to be restored. A defendant, in order to get a judgment set aside which was signed in default of appearance, must show a reasonable excuse for his failure to enter an appearance to the writ. The excuse which the defendant set up in his affidavit in the present case was not believed by either the Master or the judge, because they ordered the defendant to pay all the costs. The judge set aside the judgment on the ground that a reasonable ground of defence had been shown, but the real ground of the judge's decision to set aside the judgment was because he disliked the decision of the Court of Appeal in *Hyams* v. *Stuart King.* (1) The fact that a defendant swears an affidavit on the merits is no ground for setting aside a judgment signed in default of appearance. In *Watt* v. *Barnett* (2) a judgment had been obtained against several defendants, against one of whom an order for substituted service had been made. That defendant

(1) [1908] 2 K. B. 696.

(2) (1878) 3 Q. B. D. 183.

applied to set aside the judgment as against him on affidavits alleging merits and that he had never had any knowledge of the action whilst it was pending. The Divisional Court held that the judgment signed was regular, even if the defendant had no knowledge of the proceedings, but that the Court might in their discretion set the judgment aside, if it were shown that the defendant had no knowledge of the proceedings and had merits. As the defendant's affidavits were not free from doubt on these points the Court set aside the judgment on terms. That decision was affirmed by the Court of Appeal. (1) In the present case the defendant had knowledge of the proceedings and ought not to be allowed now to enter an appearance and defend the action on a mere affidavit of merits.

C. L. Henderson for the respondent (the defendant). It is a matter of discretion whether a judge will set aside a judgment obtained in default of appearance. Order XXVII., r. 15, of the Rules of the Supreme Court provides that "any judgment by default . . . . may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit. . . . ." The judge in the present case in setting aside the judgment acted under that rule, and this Court will not interfere with that exercise of his discretion by the judge. That Order was not in existence when *Watt* v. *Barnett* (2) was decided. In *Wright* v. *Mills* (3) the defendant had been served with the writ personally, but he did not enter any appearance and judgment was signed against him by default. On a motion to set aside the judgment it was held that the defendant must be allowed to have an opportunity of presenting his case and of defending the action upon terms.

[GREER L.J. There was a similar rule to Order XXVII., r. 15, in existence when *Watt* v. *Barnett* (2) was decided. The rule was Order XXIX., r. 14.]

Watt v. *Barnett* (2) can be distinguished. The applicant there based his application to set aside the judgment upon two grounds—namely, that he had no knowledge of the action and

(1) (1878) 3 Q. B. D. 363.
(2) 3 Q. B. D. 183, 363.
(3) (1889) 60 L. T. 887.

had a good defence on the merits. The decision may mean that the Court would only exercise its discretion upon being satisfied that the defendant had made out both grounds. That case is not cited in the Annual Practice as an authority on Order XXVII., r. 15, but under Order X. as an authority on substituted service. The practice of the Courts at that time was merely to require an affidavit as to merits on an application to set aside a judgment: see *Farden* v. *Richter*. (1)

[GREER L.J. referred to *Donald Campbell & Co.* v. *Pollak* (2), with reference to the discretion of the Court.]

[SLESSER L.J. The defendant cannot approbate and reprobate. Having taken advantage of the judgment, in the sense that he procured the plaintiff to refrain for a certain period from enforcing the judgment, he cannot now come to the Court and say that the judgment is not binding and ask to have it set aside. It was held in *Tinkler* v. *Hilder* (3) that where a party accepted costs under a judge's order, which, but for the order, would not at that time be payable, he could not afterwards object that the order was made without jurisdiction.]

[SCOTT L.J. Is not the defendant now estopped from saying that the judgment was invalid ?]

It is a matter for the discretion of the judge. In the present case there was material upon which the judge could exercise his discretion as he has done and this Court will not interfere with that exercise of discretion.

H. Shanly replied

Cur. adv. vult.

1935. Nov. 25. The following judgments were read :—

GREER L.J. This case raises a question of some importance with regard to the power of the Court of Appeal to reverse an order of the judge in Chambers made under Order XXVII., r. 15, whereby he set aside a judgment by default. The rule in question was established by the Rules of the Supreme Court, 1883, and amended by those of July, 1902, whereby the concluding provision after the words "think fit" was added.

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(1) (1889) 23 Q. B. D. 124, 129.
(2) [1927] A. C. 732.
(3) (1849) 4 Exch. 187.

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The rule as it stands reads as follows: "Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit." The jurisdiction to exercise his discretion is given to the judge in Chambers and is not given to the Court of Appeal. The rule has the effect of a statute, and we have no power to exercise the rights which are given by statute to the judge in Chambers. "The Court or a judge" means the judge in Chambers when there is an appeal from the Master to the judge in Chambers. If this rule falls to be interpreted without consideration, for the moment, of the decisions of the King's Bench Division and the Court of Appeal upon which Serjeant Sullivan relied, I think it is quite clear that power is granted to the judge in Chambers to set aside any default judgment upon such terms as to costs or otherwise as he may think fit.

The relevant facts established by affidavit which the judge in Chambers had to consider were these. The defendant had made certain bets with the plaintiff, who was a bookmaker, and had not paid them. Thereupon the plaintiff made a complaint to the National Turf Protection Society, of 23 Pembridge Square, London, and authorized the society to take such steps as they might consider necessary, including reporting the defendant to the Committee of Tattersalls. The secretary of the said society, William Ernest Irving (commonly known as A. Harrison Ford), swore by affidavit that on May 13, 1935, at an interview he had with the defendant at his premises the defendant agreed that if the plaintiff would refrain for a short time from pressing the claim to have him posted at Tattersalls he would settle the claim. He was then told by the deponent that the deponent would withhold the case from Tattersalls and relieve him from pressure if he would settle his debt to the plaintiff within a reasonable time. The deponent then confirmed the agreement by letter dated May 16, 1935. After allowing the defendant more than a reasonable time and the money not being forthcoming, a writ was issued against the defendant on July 19, 1935, claiming the money under the said agreement between

Mr. Ford as agent for the plaintiff and the defendant. The writ was served on the defendant personally on September 16, 1935. The defendant was under obligation to appear within eight days from the service of the writ. The defendant failed to appear within the time fixed by the endorsement on the writ and the Rules, and judgment was given against him. He alleged that he had been told by Mr. Ford that he would have one month in which to appear to the writ and show that he had a defence thereto. The Master before whom the application to set aside the judgment came disbelieved his statement (and it seems very difficult to accept it), having regard to the letters that passed between the defendant and Mr. Ford. The Master refused to set aside the judgment, and there was an appeal to the judge in Chambers, who made an order setting aside the judgment in default of appearance, ordered a trial by a judge alone without pleadings, and made his order setting aside the judgment subject to the terms that the plaintiff's costs of appeal and of the application before the Master should be taxed and paid by the defendant to the plaintiff. This appeal is from that order.

In my judgment the learned judge in Chambers had, under the terms of r. 15 of Order XXVII., a discretion to decide whether the judgment should be set aside or not, and we have no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law.

Serjeant Sullivan in his argument suggested that the learned judge acted as he did because he disapproved of the judgment of the Court of Appeal in *Hyams* v. *Stuart King*. (1) If we were satisfied that the judge had set aside the judgment because he disapproved of the decision in *Hyams* v. *Stuart King* (1) we would be justified in saying that he exercised his discretion on a wrong principle, and therefore in reversing his decision; but we have no reason to suppose that he did anything of the kind.

The second argument presented by Serjeant Sullivan was that it had been decided by the Queen's Bench Division in *Watt* v. *Barnett* (2), and in the same case by the Court of

(1) [1908] 2 K. B. 696.

(2) 3 Q. B. D. 183.

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Appeal (1), that the Court might in its discretion set aside the judgment if it were shown that the defendant had no knowledge of the proceedings, and that he had merits. The Court of Queen's Bench, thinking that the defendant's affidavits were not entirely free from doubt as to those points, set aside the judgment on certain terms. It will be seen that the question whether the defendant had no knowledge of the proceedings but had merits did not really arise for decision in the case, though undoubtedly Cockburn C.J. laid it down that if it had been established that he knew of the action and had an opportunity of coming in, but instead of doing so he allowed the proceedings to go on and took his chance of the other defendants defeating the plaintiff's claim, then the Court ought to refuse to set aside the judgment. Mellor J.'s judgment was to the same effect. The Court of Appeal confirmed the order of the Divisional Court setting aside the judgment, though the judge in Chambers had in his discretion refused to make any order setting aside the judgment. This decision was in 1878, when the rule in force was substantially the same as r. 15 of Order XXVII., but the power to interfere with discretionary orders does not seem to have been argued in the case, and was not finally determined until the decision of the House of Lords in *Donald Campbell & Co.* v. *Pollak.* (2)

A further argument in support of the appeal was suggested by the Court itself to the effect that, the defendant having after judgment asked for further time and being allowed seven days further time, he was precluded from applying to set aside the judgment. As I understand the case, this point was not made before the learned judge, though it in fact appears in the evidence upon affidavit. I am inclined to think that if raised it would not provide a limit to the learned judge's discretion ; he would still have power to say that, exercising his discretion, on the whole he thought it right to set aside the judgment on the terms that he did, having been satisfied, as I am, that the defendant had on the merits disclosed a defence to the action (whether that defence was likely

(1) 3 Q. B. D. 363.

(2) [1927] A. C. 732.

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to succeed or not), on the ground that he had, as he alleges in one of his affidavits, never made with Mr. Ford the alleged agreement. It was put by one of my brethren on the ground that a man is not entitled to reprobate that which he has already approbated. In my view, that principle has no application to this case, because it is based on this, that a man may not at one moment take an advantage of some agreement or some fact and at a later moment when it suits him reprobate that which he has approved. But in this particular case the defendant took no benefit whatever from the judgment: the judgment was one which was entirely against him, ordering him to pay the amount of the claim and costs. As regards estoppel, which was also suggested, it seems to me that it has been determined now for a long time to be good law that you cannot make an estoppel out of a promise to do something in the future. That has been the law ever since the decision in *Jorden* v. *Money*. (1) If a promise is to have any effect at all it must be as a contract, and if there be no consideration for it then there is no contract. In this case it seems to me that there was no consideration whatever for the promise of the judgment creditor to hold over for a week, because all he got in return for that was a promise by the defendant that he would perform that which he was under a legal obligation to perform having regard to the existence of the judgment, which had not been set aside. As I have said, it would not, in my judgment, provide a limit to the judge's discretion, but it would be a matter which he would be entitled to take into his consideration before he exercised his discretion. It does not appear to me to be necessarily conclusive against the exercise of the judge's discretion that the defendant had, before he had consulted his solicitor, asked for the judgment to be held over for a week, as he was not thereby prevented from asking the Court to say that he ought to have the judgment set aside and be left to such rights as he might have by way of defence. It is quite clear that at the hearing before the learned judge in Chambers no point such as was made by the two members of this Court

(1) (1854) 5 H. L. C. 185.

was ever urged, but it does not follow from that, as he had the affidavit before him, that he did not consider the point and did not exercise his discretion having regard to everything that was said in the affidavits which he had to consider.

In my judgment the appeal ought to be dismissed, because no sufficient reason has been brought to our attention to induce us to interfere with the exercise by the learned judge of the discretion given to him by the express terms of Order XXVII., r. 15. I take the decision in *Donald Campbell & Co.* v. *Pollak* (1) in the House of Lords as meaning that wherever the judge in Chambers is invested with a discretion the Court of Appeal has no power to set aside an order made by him in the exercise of his discretion unless the Court comes to the conclusion that he exercised his discretion on grounds which were wholly irrelevant to the matters which he had to consider, or insufficient in law to support his decision.

For these reasons I have come to the conclusion that the appeal ought to be dismissed with costs.

I have stated the judgment of this Court as it would be delivered if my view prevailed; but, as my brethren differ from me, it will be as they state.

SLESSER L.J. This is an appeal from an order of Greaves-Lord J. setting aside a judgment obtained by the plaintiff and signed on September 24, 1935, given in default of appearance. The learned judge in purported exercise of his discretion under Order XXVII., r. 15, set aside the judgment subject to the maintenance of the then position as regards costs. In my view, in so acting the learned judge was wrong and the proper application of the principles of law which arise on the facts of the case required him as a matter of right to refuse to disturb the judgment obtained.

The reasons why I have come to this conclusion and find that the history of the case precluded the learned judge from exercising the discretion which he would normally possess under the Rules are as follows. In the correspondence annexed to the affidavits before the learned judge it appears that on September 24, 1935, the solicitors for the plaintiff wrote to the defendant as follows: "I have to inform you that I have to-day obtained judgment against you for the sum of 1241*l.* 11*s.* 9*d.* together with 7*l.* 2*s.* costs. I shall be glad to receive your cheque for the total amount to obviate the necessity of proceeding on the judgment."

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(1) [1927] A. C. 732.

In reply thereto, on September 26 the defendant wrote: "I am in receipt of yours of the 24th and note the contents. I have seen Mr. Bartlam" (the plaintiff) "to-day and explained my position, and he is willing for the matter to stand over so that I can see if I can make any arrangement to pay. I have never refused to pay him but have not had any income to do it with owing to bad trade. He is writing to Mr. Ford to-night. At the moment I have nothing and no assets and know he does not want to lose his money. Yours faithfully, Walter Evans." "P.S. Kindly hold over for me and oblige."

Finally on September 28 the solicitors agreed to give the defendant time, saying, with the authority of their client: "In all the circumstances I am prepared to let the matter stand over for a further period of seven days, but I must ask you to understand please that, unless at the expiration of that period I receive payment of the total amount due, proceedings will be taken to enforce the judgment without further notice to you."

This total judgment included not only the sum originally due but also the costs of 7*l.* 2*s.*, for all of which the plaintiff could have issued execution at once. In answer to the appeal of the defendant he stayed his hand, and, in my opinion, it is not possible for the defendant, having obtained this advantage on the basis that he did not dispute the validity of the judgment, now to come forward and ask the Court to set it aside upon the plea that he has a defence on the merits or that there are facts entitling him to defend. Although perhaps it would not be terminologically accurate to say that he is estopped from taking this step, yet, having approbated the judgment in order to obtain the benefit of delay, the

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authorities are clear to show that in such a case he should not be heard to say that it should be set aside. The case is nearer an estoppel by record than an estoppel in pais. A party cannot take advantage of an order and then be heard to impeach it: *Tinkler* v. *Hilder*. (1) "The party who makes the application to rescind the order, having taken something under that order, must be considered to have adopted it, and cannot now be heard to impeach it": per Pollock C.B. (2) A party cannot retain the benefit of a decision given on the footing that his liability continues and then at the same time insist that his liability has determined. "It would be playing fast and loose with justice if the Court allowed that": per Bowen L.J. in *Gandy* v. *Gandy*. (3) See also *Rex* v. *Taylor* (4) to the same effect.

The only doubt which I have felt in this case is due to the fact that the principle of approbation and reprobation here invoked was not argued in the Court below and was not considered, apparently, by the learned judge. But, in my view, the matter goes to the root of the defendant's application and should have been taken by the Court as a bar to the defendant, in the circumstances, being heard at all. The power of the Court to set aside a judgment properly obtained, albeit by default, is one conferred upon it by Rules of Court. I do not read that power as having disturbed the fundamental principle on which the Court has always acted, that a person cannot approbate and reprobate: "The same broad principle, that a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion": per Wilde B. in *Cave* v. *Mills*. (5)

As the judgment of Scott L.J. is to the same effect, this appeal will be allowed: the judgment of September 24, 1935, for 1241*l*. 11*s*. 9*d*., together with 7*l*. 2*s*. costs, should be restored; but in so far as the point was not taken before the learned judge (which is the basis of my judgment) there will be no costs of this appeal.

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(1) 4 Exch. 187, 190.
(2) Ibid. 191.
(3) (1885) 30 Ch. D. 57, 82.
(4) [1915] 2 K. B. 593.
(5) (1862) 7 H. & N. 913, 927.

SCOTT L.J. Although I am in agreement with Greer L.J. in his summary of the facts of this case down to September 24, 1935, and need not recapitulate them, I feel obliged, though with hesitation, to differ from him in his conclusion as to the legal effect of what subsequently happened. On that day the plaintiff's solicitor wrote to the defendant informing him that he had obtained judgment against him for 1241*l.* 11*s.* 9*d.*, together with 7*l.* 2*s.* costs, and asked for a cheque to obviate the necessity of proceeding on the judgment. On September 26 the defendant saw the plaintiff and requested him to instruct his solicitor to give him (the defendant) time to pay the amount due under the judgment; and on the same day the defendant replied to the letter from the plaintiff's solicitor of the 24th and added: "I have seen Mr. Bartlam to-day and explained my position, and he is willing for the matter to stand over so that I can see if I can make any arrangement to pay." "P.S. Kindly hold over for me and oblige." On the next day the plaintiff instructed his solicitor to allow the matter to stand over for one week, and on September 28 his solicitor wrote to the defendant saying (inter alia): "In all the circumstances I am prepared to let the matter stand over for a further period of seven days, but I must ask you to understand please that, unless at the expiration of that period I receive payment of the total amount due, proceedings will be taken to enforce the judgment without further notice to you."

In spite of this definite arrangement to give time and abstain in the meantime from execution Greer L.J. regards the question before the learned judge as being still one of pure discretion, and for that reason would dismiss the appeal. He concedes that if counsel for the plaintiff when before the learned judge had relied upon the above arrangement between the parties as an answer to the application to set aside it would have been a matter for consideration whether it was not a good answer in law; but the Lord Justice thinks that it was

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not sufficiently brought to the notice of the judge to fetter the discretion which he had apart from that answer.

On such a question I differ with hesitation, but the point seems to me one of somewhat far-reaching importance. Speaking for myself, I think it is a case where the general principle "interest reipublicæ ut sit finis litium" applies. If the above facts, which were plainly stated in the affidavits before the learned judge, constitute a sufficient reason in law against setting aside the judgment, I cannot but think that, as they were patent upon the face of the proceedings, it was the duty of the judge in Chambers of his own motion to act upon them and refuse the application. This being so, it was not a matter of pure discretion, and this Court must, in my view, decide whether they do or do not constitute a ground in law for refusing the application. In my opinion they do. A defendant cannot, in my view, be heard to say that he was ignorant of his right under the Judicature Act and the Rules of the Supreme Court, to apply to set aside the judgment as soon as he knew of it by making an application supported by an affidavit of "merits." If he did not know he should have taken advice. If he had consulted a solicitor he would have learnt what his rights were, and he cannot put himself in a better position by omitting to take legal advice. "Ignorantia juris non excusat." It was contended before us that, although the plaintiff did hold his hand and abstain from attempting to enforce execution, he lost nothing by it. But the defendant cannot put that burden upon the plaintiff: he is not entitled to draw or to ask the Court to draw any such inference from the mere absence of affirmative evidence by the plaintiff that he was prejudiced by the delay.

The position of a defendant against whom judgment has been signed in default may be regarded in three analogous aspects. It may be said that he has a right to elect whether he will apply to set it aside or not, and that if, with knowledge of the facts he takes any action amounting to an election not to apply, his right to apply is thereby determined. His position is, in truth, analogous in principle to the statutory

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right of a defendant under s. 4 of the Arbitration Act, 1889, to elect whether he will apply for a stay or not. The statute there says that a party may before taking any steps in the proceedings apply to the Court to stay the proceedings, and if he does take any step in the proceedings he loses his right; but the principle of that provision is that in regard to the pending action the defendant must elect between the public forum and the private forum, both the plaintiff and the Court being entitled to know from the defendant without delay how he elects—whether he is content that the Court shall adjudicate, or desires that the dispute shall be referred to arbitration. Another way of looking at the question is to treat it as an instance of the rule that a party cannot both approbate and reprobate, and to hold accordingly that a defendant cannot accept a judgment as final and binding and thereafter seek to set it aside as not binding. There is still a third way of looking at the question, as suggested by Slesser L.J. during the argument—namely, that where a defendant, by language or conduct, represents to the plaintiff that he accepts a judgment as final and is not going to seek to have it set aside, the plaintiff's position is so liable to be prejudiced by a subsequent change of mind on the part of the defendant, with its consequent application to have the judgment set aside, that the defendant should be regarded as being estopped from any such subsequent application. Of these three points of view I think the first appropriate to the facts of this case.

If on a consideration of the evidence the correct inference was that the defendant ought for any one of the above reasons to be treated as having abandoned or lost his right to apply to set aside, then I think it was the duty of the judge to take the point, whether it was argued or not. I think it was the correct inference—for in my view the defendant elected to treat the judgment as binding; and if so it follows that the decision of the learned judge cannot be regarded as entirely one of discretion; and in my view the appeal should be allowed.

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In the result I agree with Slesser L.J. in the order which he has proposed, including his order as to costs.

Appeal allowed. (1)

Solicitor for appellant : *Leslie Marrison.*

Solicitors for respondent : *Maude & Tunnicliffe, for Stirk & Co., Wolverhampton.*

R. F. S.

1935
Oct. 16.

DUNCAN *v.* JONES.

Police—Public meeting in street—Reasonable apprehension of breach of the peace—Right to prohibit.

The appellant was about to address a number of people in a street when a police officer, who reasonably apprehended that a breach of the peace would occur if the meeting were held, forbade her to do so. The appellant persisted in trying to hold the meeting and obstructed the police officer in his attempts to prevent her doing so. Neither the appellant nor any of the persons present at the meeting committed, incited, or provoked a breach of the peace :—

Held, that, as it is the duty of a police officer to prevent breaches of the peace which he reasonably apprehends, the appellant was guilty of wilfully obstructing the officer when in the execution of his duty.

CASE stated by County of London Quarter Sessions.

At 1 P.M. on July 30, 1934, about thirty people, including the appellant, Mrs. Katherine Duncan, collected with a view to holding a meeting in Nynehead Street, New Cross, in the borough of Deptford, near to the entrance to an unemployed training centre situate in that street. At the entrance to Nynehead Street a notice was written across the roadway as follows :—

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(1) On Dec. 2, 1935, leave to appeal to the House of Lords was granted to the defendant.

" SEDITION."

Meeting at the Test Centre to-day (now) 1 P.M.

Speakers : R. Kidd (Council for Civil Liberties),
A. Bing (Barrister-at-Law),
E. Hanley (Amalgamated Engineers' Union),
K. Duncan (National Unemployed Workers' Movement),

Defend the right of free speech and public meeting.

A box was placed in the roadway opposite the entrance to the training centre, on which the appellant was about to mount, when the chief constable of the district, with whom was the respondent, William Jones, an inspector of the Metropolitan Police, told the appellant that a meeting could not be held in Nynehead Street, but that it could be held in Desmond Street, some 175 yards distant. The appellant then said : " I'm going to hold it," stepped on to the box, and started to address the people who were present, when the respondent immediately took her into custody, to which she submitted without resistance.

An information was preferred on August 6, 1934, at Tower Bridge Police Court by the respondent against the appellant under the Prevention of Crimes Act, 1871, s. 12, as amended by the Prevention of Crimes Amendment Act, 1885, s. 2, alleging that on July 30, 1934, the appellant did unlawfully and wilfully obstruct the respondent when in the execution of his duty. The magistrate convicted the appellant and fined her 40s. The appellant appealed to London Quarter Sessions.

At the hearing of the appeal it was not alleged on behalf of the respondent that there was any obstruction of the highway or of the access to the training centre, save in the sense of the obstruction necessarily caused by the box which was placed in the roadway and by the presence of the people surrounding it. Neither was it alleged that the appellant nor any of the persons present at the meeting had either committed, incited or provoked any breach of the peace.

It was proved or admitted that on May 25, 1933, a meeting had been held opposite the entrance to the training centre, and the appellant had addressed that meeting. Following that meeting and on the same day a disturbance took place inside the training centre. The superintendent of the training centre, who attributed the disturbance to the meeting, sent for the police to prevent a breach of the peace. Subsequently, and in spite of the disturbance and of warnings by the police, the appellant, for some reason unexplained by her, made one or more attempts to hold a meeting at the same spot, which were frustrated by the police. Before July 30, 1934, the superintendent of the training centre, who feared a repetition of the previous disturbance, communicated with the police, and by reason of such communication and of reports by the police in the course of their duty, the chief constable of the district and the respondent apprehended that a breach of the peace would result if the meeting now in question were held.

The deputy-chairman of quarter sessions was of opinion: (1.) that in fact (if it be material) the appellant must have known of the probable consequences of her holding the meeting—namely, a disturbance and possibly a breach of the peace—and was not unwilling that such consequences should ensue; (2.) that in fact the respondent reasonably apprehended a breach of the peace; (3.) that in law it thereupon became his duty to prevent the holding of the meeting; and (4.) that in fact, by attempting to hold the meeting, the appellant obstructed the respondent when in the execution of his duty. The appeal was, therefore, dismissed.

On the application of the appellant, quarter sessions stated this case for the opinion of the Court whether there was evidence on which the deputy-chairman could so decide in point of law.

Pritt K.C. and *Dingle Foot* for the appellant. It is not unlawful to hold a public meeting on the highway. The police have no right to prevent a person doing a lawful act merely because they think that a breach of the peace may result from it, and, therefore, when the appellant obstructed the respondent, as admittedly she did, he was not acting "in the execution of his duty" within the meaning of the statutes. In *Beatty* v. *Gillbanks* (1) the appellants assembled for a lawful purpose, but with good reason to suppose that a breach of the peace would result, yet it was held that they could not be convicted of unlawful assembly. True that the charge is different in the present case, but the same principle should be applied. On the facts stated in the present case the appellant could no more be rightly convicted than a person can be bound to good behaviour without being guilty of misbehaviour: *Reg.* v. *Londonderry Justices*, per O'Brien J. (2) If (which is not admitted) the disturbance of May, 1933, resulted from the meeting which she had then just held, she was not responsible for those who caused it, and the bad conduct of another person cannot make that wrong which is otherwise innocent. (2)

[They also referred to Dicey's Law of the Constitution, 8th ed., p. 508.]

Montgomery K.C. and *Vernon Gattie* for the respondent. If a police officer reasonably apprehends that the action of any person may result in a breach of the peace, it is his duty to prevent that action. If the appellants in *Beatty* v. *Gillbanks* (1) had been directed to discontinue the assembly by a police officer who reasonably apprehended that a breach of the peace would result, and they had refused to do so, they would have been rightly convicted of obstructing the police officer when in the execution of his duty. In *Reg.* v. *Prebble* (3) it is made clear that the police would have been justified in clearing the public-house in question of the persons assembled there "had there been . . . . any danger of a breach of the peace." (4)

[They were stopped.]

Pritt K.C. replied.

LORD HEWART C.J. There have been moments during the argument in this case when it appeared to be suggested that the Court had to do with a grave case involving what is called the right of public meeting. I say "called," because English law does not recognize any special right of public meeting for political or other purposes. The right of assembly, as Professor Dicey puts it (1), is nothing more than a view taken by the Court of the individual liberty of the subject. If I thought that the present case raised a question which has been held in suspense by more than one writer on constitutional law—namely, whether an assembly can properly be held to be unlawful merely because the holding of it is expected to give rise to a breach of the peace on the part of persons opposed to those who are holding the meeting—I should wish to hear much more argument before I expressed an opinion. This case, however, does not even touch that important question.

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(1) (1882) 9 Q. B. D. 308.
(2) (1891) 28 L. R. Ir. 440, 450.
(3) (1858) 1 F. & F. 325.
(4) Ibid. per Bramwell B., at p. 326.

Our attention has been directed to the somewhat unsatisfactory case of *Beatty* v. *Gillbanks*. (2) The circumstances of that case and the charge must be remembered, as also must the important passage in the judgment of Field J., in which Cave J. concurred. Field J. said (3): "I entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them." Our attention has also been directed to other authorities where the judgments in *Beatty* v. *Gillbanks* (2) have been referred to, but they do not carry the matter any further, although they more than once express a doubt about the exact meaning of the decision. In my view, *Beatty* v. *Gillbanks* (2) is apart from the present case. No such question as that which arose there is even mooted here.

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(1) Dicey's Law of the Constitution, 8th ed., p. 499.

(2) 9 Q. B. D. 308.

(3) Ibid. 314.

The present case reminds one rather of the observations of Bramwell B. in *Reg.* v. *Prebble* (1), where, in holding that a constable, in clearing certain licensed premises of the persons thereon, was not acting in the execution of his duty, he said: "It would have been otherwise had there been a nuisance or disturbance of the public peace, or any danger of a breach of the peace."

The case stated which we have before us indicates clearly a causal connection between the meeting of May, 1933, and the disturbance which occurred after it—that the disturbance was not only post the meeting but was also propter the meeting. In my view, the deputy-chairman was entitled to come to the conclusion to which he came on the facts which he found and to hold that the conviction of the appellant for wilfully obstructing the respondent when in the execution of his duty was right. This appeal should, therefore, be dismissed.

HUMPHREYS J. I agree. I regard this as a plain case. It has nothing to do with the law of unlawful assembly. No charge of that sort was even suggested against the appellant. The sole question raised by the case is whether the respondent, who was admittedly obstructed, was so obstructed when in the execution of his duty.

It does not require authority to emphasize the statement that it is the duty of a police officer to prevent apprehended breaches of the peace. Here it is found as a fact that the respondent reasonably apprehended a breach of the peace. It then, as is rightly expressed in the case, became his duty to prevent anything which in his view would cause that breach of the peace. While he was taking steps so to do he was wilfully obstructed by the appellant. I can conceive no clearer case within the statutes than that.

SINGLETON J. On the facts stated in the case I am satisfied that the respondent at the material time was doing that which it was his duty to do, and that, therefore, the obstruction of him by the appellant constituted obstruction of him when in the execution of his duty. Authorities in other branches of the law do not carry the matter any further. I agree that the appeal should be dismissed.

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(1) 1 F. & F. 325, 326.

Appeal dismissed.

Solicitor for appellant: *R. W. G. Mackay.*
Solicitors for respondent: *Wontner & Sons.*

G. F. L. B.

1935
Oct. 17, 18.

DE KEYSER *v.* BRITISH RAILWAY TRAFFIC AND ELECTRIC COMPANY, LIMITED.

Revenue—Customs—Forfeiture of vehicle used for conveyance of goods liable to forfeiture—Order for condemnation by justices—Absence of discretion—Customs Consolidation Act, 1876 (39 & 40 *Vict. c.* 36), *ss.* 202, 207, 226.

A motor tank wagon was seized by officers of the Customs and Excise on the ground that it was being used in the conveyance of goods liable to forfeiture under the Customs Acts. The owners claimed the vehicle under s. 207 of the Customs Consolidation Act, 1876, and an information was exhibited before justices on behalf of the Commissioners of Customs and Excise for the forfeiture and condemnation of the vehicle under s. 226 of the Act:—

Held, that, it having been admitted that the vehicle had been used in the conveyance of goods liable to forfeiture (in which case s. 202 of the Act provides that the vehicle itself shall be forfeited), the justices were bound to condemn the vehicle, s. 226 giving them no discretion to refuse to do so on the ground, for example, of hardship on an innocent owner.

CASE stated by justices.

At a court of summary jurisdiction sitting at Stratford, Essex, an information was preferred by the appellant, Israel de Keyser, an officer of Customs and Excise, on behalf of the Commissioners of Customs and Excise, against the respondents, British Railway Traffic and Electric Company, Ld., alleging that on July 25, 1934, one motor tank wagon and the contents thereof were seized at Barking, in the county of Essex, and that the said tank wagon contained a mixture of hydrocarbon oils on which a rebate of duty had been allowed under s. 2, sub-s. 3, of the Finance Act, 1928, as amended by s. 6, sub-s. 1, of the Finance Act, 1933, and light oils mixed in contravention of s. 4 of the Finance (No. 2) Act, 1931, whereby the said contents became forfeited under the said s. 4, sub-s. 2, and that the said motor tank wagon was made use of in the conveyance of the said mixture being goods liable to forfeiture under the Customs Acts, whereby the said tank wagon became forfeited under s. 202 of the Customs Consolidation Act, 1876 (1), and that British Railway Traffic and Electric Co., Ld., had claimed for same.

On the hearing of the information the following facts were admitted:

The respondents were at all material times the owners of

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(1) By the Customs Consolidation Act, 1876, s. 202: "All . . . . conveyances . . . . made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts shall be forfeited . . . ."

By s. 207: "Whenever any seizure shall be made, unless in the possession or in the presence of the offender, master, or owner as forfeited under the Customs Acts . . . . the seizing officer shall give notice in writing of such seizure and of the grounds thereof to the master or owner of the things seized, if known . . . .; and all seizures made under the Customs Acts . . . . shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Commissioners of Customs may direct, unless the person from whom such seizure shall have been made or the master or owner thereof, or some person authorized by him, shall, within one calendar month from the day of seizure, give notice in writing . . . . that he claims the things so seized or intends to claim them, whereupon proceedings shall be taken for the forfeiture and condemnation thereof either by information filed in the Exchequer Division of the High Court of Justice in England on the Revenue side, or exhibited before any justice of the peace; . . . ."

By s. 226: "When any information shall have been exhibited before any justice for the forfeiture of any goods seized under the Customs Acts, such justice is hereby required to summon the owner of such goods or the person from whom they were seized to appear before him or any other justice, and upon his or her appearance or default to appear, due service of such summons being proved, such justice may proceed to the examination of the matter, and on proof that the goods are liable to forfeiture under the Customs Acts may condemn the same."

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a certain motor tank wagon, which at the material time was in the possession of one Joseph Harris under the terms of a hire-purchase agreement entered into between Harris and the respondents. On July 25, 1934, one Bertie Dumbleton, an employee of Joseph Harris, proceeded in the tank wagon to the Thameshaven Depot of the Thameshaven Oil Wharves, where he loaded into the wagon 750 gallons of petrol, the said petrol being a light hydrocarbon oil, 500 gallons being in the forward tank of the wagon and 250 gallons in the rear tank of the wagon. Dumbleton returned with the loaded tank wagon to the premises of Joseph Harris at Barking, where he removed from the forward tank of the wagon 75 gallons of petrol which he then proceeded to replace by kerosene, which was a hydrocarbon oil other than a light hydrocarbon oil. Dumbleton was in this manner guilty of an offence under s. 4, sub-s. 1, of the Finance (No. 2) Act, 1931, in that he mixed hydrocarbon oils in respect of which a rebate of duty had been allowed under s. 2, sub-s. 3, of the Finance Act, 1928, with light oils and the mixture was liable to forfeiture under s. 4, sub-s. 2, of the Act of 1931. The tank wagon was, therefore, used in the conveyance of goods liable to forfeiture under the Customs Acts. The respondents were wholly unaware of and free from complicity in the transaction referred to. The tank wagon was seized by officers of the Customs and Excise in accordance with the provisions of the Customs Consolidation Act, 1876. The respondents received notice of seizure in accordance with the provisions of s. 207 of the Act from the Customs officer who made the seizure and within the time therein provided they duly claimed the tank wagon. The appellant thereafter, under the direction of and by order of the Commissioners of Customs and Excise, on October 22, 1934, took proceedings by way of information in accordance with s. 207 and s. 218 (as replaced by s. 11 of the Customs and Inland Revenue Act, 1879) of the Act of 1876 claiming that the tank wagon should be condemned as forfeited.

The justices held that the motor tank wagon was liable to forfeiture under s. 202 of the Customs Consolidation Act, 1876, but that, having regard to the provisions of s. 226 of the Act and the fact that the respondents were the rightful owners under the terms of the hire-purchase agreement, they had a discretion whether they should or should not condemn the same. In the proper judicial exercise of that discretion they decided not to make an order for condemnation.

The appellant appealed.

Sir Thomas Inskip A.-G. and *Valentine Holmes* for the appellant. The justices were wrong. If the proper construction of s. 226 is that justices have a discretion whether or not they shall condemn a vehicle which has been used for the conveyance of goods liable to forfeiture, the provisions of s. 226 would be inconsistent with the imperative words in s. 202 declaring that such a vehicle "shall be forfeited." Therefore, the words "may condemn" in s. 226 must imply a duty in the justices to condemn. Enabling words are compulsory where they are words to effectuate a legal right: *Julius* v. *Oxford (Bishop of)* (1), *Sheffield Corporation* v. *Luxford.* (2) Here the words "may condemn" are used to effectuate the legal right of the Crown to the condemnation of goods declared forfeit under s. 202 and the words are therefore, compulsory. If the facts indicated by s. 202 are proved the vehicle is ipso facto forfeited and no question of hardship on the owner is relevant: *Lord Advocate* v. *Crookshanks.* (3) In a proceeding under s. 226 the only plea that can be put forward by the owner is that the vehicle did not come within s. 202. The owner is not thereby left without a remedy, as he can apply to the Commissioners of Inland Revenue in their discretion to restore the vehicle seized: s. 35 of the Inland Revenue Regulation Act, 1890 (which now takes the place of s. 209 of the Customs Consolidation Act, 1876).

van den Berg K.C. and *Alchin* for the respondents. The Customs Consolidation Act, 1876, is a penal statute and must be construed strictly against the Crown. If the argument

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(1) (1880) 5 App. Cas. 214.
(2) [1929] 2 K. B. 180.
(3) (1888) 15 R. 995.

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for the appellant is correct, a vehicle might be stolen, used for the conveyance of uncustomed goods, and, therefore, be forfeited, although the owner was quite innocent. In the present case the innocent owners of a vehicle have been deprived of their property through no fault of their own. In such circumstances it is reasonable that the justices should have a discretion, and they have such a discretion on the right interpretation of s. 226. True that s. 202 declares that certain property "shall be forfeited," but s. 207 then opens up the possibility of proceedings to decide whether the forfeited property should be condemned. The right is preserved to the owner of the property to contend that it should not be condemned, and therefore the permissive words "may condemn" are used in s. 226 in deliberate preference to the compulsory "shall condemn." True also that enabling words are compulsory when they are used to effectuate the legal right of an individual, but they are not to be so construed when the enforcement of a public right by a penalty is in question. That appears clearly from the judgments in *Julius* v. *Oxford* (*Bishop of*). (1) The question whether the justices have a discretion was not raised in *Lord Advocate* v. *Crookshanks*. (2) The only question raised there was whether it was necessary to prove mens rea in the owner. *Ex parte Jarman* (3) was also referred to.

LORD HEWART C.J. In my opinion, the argument of the Attorney-General is convincing and conclusive and that advanced on behalf of the respondents discloses a misapprehension of the scheme of this enactment.

Sect. 202 of the Customs Consolidation Act, 1876, provides that in certain circumstances a conveyance shall be forfeited. Provisions for two possible events follow. One is where no claim is made to the conveyance. The other is where, the specified notices having been given by the owner of the conveyance forfeited, proceedings come before one of the tribunals named in s. 207 on information for the condemnation

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(1) 5 App. Cas. 214.

(2) 15 R. 995, 998.

(3) (1877) 4 Ch. D. 835.

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of the conveyance. In the present case, the conveyance having been seized in circumstances which clearly brought it within s. 202, proceedings were taken before justices who had to concern themselves with the meaning of s. 226 of the Act.

It is common ground that when the word "may" first appears towards the end of this section it means "must." It is not denied that, judicial proceedings having been started, it is the duty of the justices to proceed to an examination of the matter, but it has been argued on behalf of the respondents that the second "may," which occurs after an interval of only a few words in the section, means "may if the justices think fit." Against that view the Attorney-General contends that the second "may" means "must."

Our attention has been directed, in particular, on this matter to *Julius* v. *Oxford (Bishop of)* (1), where Lord Cairns L.C. said: "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

It seems to me that in the present case the power of the justices is coupled with a duty and that, when once the necessary facts have been established, and an application has been made for the condemnation of the property in question, the justices have no choice but to condemn. I am fortified in that view by the Scottish decision, *Lord Advocate* v. *Crookshanks* (2), which is not binding on us but is illuminating. The eminent judge who presided on that occasion (Lord Inglis) described the proceedings with which the Court

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(1) 5 App. Cas. 222.

(2) 15 R. 995, 998.

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was concerned as proceedings "to give effect to" the forfeiture.

It seems to me that on a true construction of this statute, where certain events have happened—and in the present case there is no dispute that those events have happened—the property in question is labelled "forfeited" under s. 202. There may be, where the owner of the property or other person authorized by him gives notice of a claim, an inchoate forfeiture which is to be completed by the combined forfeiture and condemnation contemplated by s. 226. What is it that is open to the claimant on such proceedings? In my opinion, nothing more is open to him than to contend, and, if need be, to offer evidence to prove, that, on a true view of the facts, the conveyance in question does not come within the class of things which, by s. 202, are forfeited. He may contend with success, for instance, that through error or otherwise a conveyance not liable to be forfeited has been seized. He may say in whatever form is suitable to the relevant facts that the conveyance does not come within the class of things forfeited. But once it is established that the conveyance does come within that class, this undoubtedly rigorous statute gives the claimant no opportunity of asking the Court to take into consideration mitigating circumstances with the effect of removing the conveyance from that class. There is no opportunity for mercy with regard to a conveyance which has been forfeited, although there may be grounds for contending that the conveyance does not come within the class of forfeited property.

In the present case no such contention was advanced. All that was argued on behalf of the respondents was that they did not know of the wrongful use for which the lorry was being employed. That circumstance was wholly irrelevant to the proceedings before the justices. It did not affect the purpose for which the lorry had been used. If that sort of argument were to be open to the owner of a conveyance in such a case as the present, the result might be, in the case of two partners, where one was aware of the wrongful use to which the vehicle was being put and the other was not, that the vehicle might be excused from condemnation because of the innocent mind of one of the partners, that result enuring for the benefit of the guilty partner. In the present case the argument adduced before the justices, which was really an argument in mercy, that the owner of the vehicle was not aware of the illegal use to which it was being put, was wholly irrelevant to the only question which the justices had to consider.

That question was: On the facts is it true to say that this conveyance falls within the category of things which are forfeited by reason of the operation of s. 202? That there is in the word "may" when it occurs for the second time in s. 226 a limited discretion is no doubt true. The justices may not find that the facts leading to forfeiture are proved, or they may find that some error has been made, but the only question for the justices is not whether they can extend leniency in view of the facts of a particular case but whether the conveyance comes within the description of forfeited things.

On the facts of this case the justices had no option. The only course open to them was to condemn a conveyance that was forfeit under s. 202. This appeal should be allowed, with costs, and the case remitted to the justices with a direction to them to condemn the lorry.

HUMPHREYS J. I am of the same opinion. The statement of the findings and opinion of the justices in the Case is not very full nor, perhaps, very clear, but I think that this matter must be decided on the assumption that the justices considered that they had a discretion to take into consideration all the facts of the case in determining whether or not they should condemn the conveyance in question. I am clearly of opinion that they were wrong in law in coming to that conclusion.

In my judgment, however, it by no means follows that when the word "may" occurs for the second time in s. 226 it is imperative as distinct from permissive. It appears to me that the important section in this part of this Act is

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s. 202 and not s. 226. Sect. 202 is free from ambiguity. It is perfectly clear and direct in its terms. It provides that (inter alia) all conveyances used in various illegal ways, including the conveyance of goods liable to forfeiture, shall be forfeited. On the plain terms of that section, as soon as it is ascertained that a conveyance has been used in the conveyance of goods liable to forfeiture, ipso facto that conveyance is forfeited. It would be remarkable if one found in subsequent sections something which cut down that plain statement of the result of certain facts, and I do not find anything of the sort. Sect. 207 does nothing to alter the position. All it does is to provide that the owner of the conveyance, who may be a completely innocent person, and completely unaware of the facts of the case, may give notice that he claims the property seized, whereupon proceedings shall be taken for the forfeiture and condemnation of the property before, among other tribunals, a justice of the peace. What is the question which the justice has to decide? As the statute clearly says, it is whether the property is liable to forfeiture. That is the only question which the justice is called on to decide.

A good deal has been said in this case about the hardship which might result in the case of some valuable vehicle being forfeited because some person happened to be in it who had in his possession goods liable to forfeiture. The answer to that contention is to refer to s. 209, by which the most ample provision was made for the remission by the Commissioners themselves of the forfeiture which has already been decreed. That section has been slightly altered in its terms by s. 35 of the Inland Revenue Regulation Act, 1890, which section must now be read into the Act of 1876 in substitution for s. 209 (Excise Transfer Order, 1909 (St. R. & O., 1909, No. 197), para. 24). But s. 209 was part of the Act of 1876 as it was originally passed, and one must assume that the Commissioners will act reasonably and without undue hardship if an application is made to them to remit the forfeiture which the law has imposed on some vehicle.

That leads me to s. 226, which provides what a justice is to do when an information has been exhibited for the forfeiture of goods seized under the Customs Acts and the parties are represented before him. That section seems to me to state in clear and definite terms what the powers of the justice are. On the appearance of the owner of the goods or that of the person from whom they were seized the justice "may proceed to the examination of the matter." What matter? The section goes on to provide that the justice "on proof that the goods are liable to forfeiture under the Customs Acts may condemn the same," and in my opinion it is quite clear that the only question with which the justice is concerned is the question of fact whether the goods are liable to forfeiture under the Customs Acts. It is true that the words in the section are "may condemn" and the view I take is that "may" is the proper term to use. "Shall" or "must" would have imposed on the justices the necessity of making some order which would have the effect of condemning the goods in question and in some cases it may well be that the Customs authorities do not ask for an order. It must be remembered that any order made by the justice is really superfluous and does not alter the status of any goods which have become forfeited under s. 202. The only object in asking for an order from the justice is, as was said in *Lord Advocate* v. *Crookshanks* (1), to give effect to the forfeiture which has already taken place. That seems to me to be the probable explanation of why the justice is not required to make an order in every case. It may not be asked for and it may be quite unnecessary. On the other hand, I take the view that, if the Customs authorities do ask for an order, it being a very convenient way of expressing in an official form the findings of the justice that the goods are liable to forfeiture, they are entitled to have it. There is nothing to be found in any part of the Act of 1876 which would entitle the justice to enter on a roving inquiry into the circumstances of the case and the rights of the parties inter se, and to decide whether or not he should override the perfectly clear terms of s. 202. When once it is found that

(1) 15 R. 995.

a vehicle has been used for the conveyance of goods liable to forfeiture, that vehicle is itself forfeited. For these reasons I agree that this appeal should be allowed.

SINGLETON J. I agree. It is found as a fact that the tank wagon with which we are concerned was used for the conveyance of goods liable to forfeiture under the Customs Acts and consequently s. 202 applied to it. Sect. 226 refers to proceedings before justices. The first "may" in that section clearly means "shall" or "must," but it has been argued by Mr. van den Berg that the second "may" has a different meaning and leaves it in the discretion of the justice whether or not he shall make an order or not, and that he need not do so, although the property in question in the particular case comes within s. 202, if, for example, he thinks that any hardship will result.

Clearly the question of hardship might arise if the user of the vehicle was without the knowledge of the owner, but it is to be observed that in *Lord Advocate* v. *Crookshanks* (1) it was decided by the Court of Session that knowledge on the part of the owner of the vehicle is irrelevant in such a proceeding as this and that the mere use of the vehicle for the unlawful purpose indicated by s. 202 of the Act of 1876 infers a statutory forfeiture of the vehicle irrespective of the knowledge or consent of the owner thereof. In that case it was pointed out in more than one judgment that the question of hardship did not enter into the matter at all and that the Legislature had provided that a public body would see that no hardship was really done in any case. Unless the justice is bound, on proof of the facts specified in s. 202, to make an order condemning the vehicle, the absurd position would arise of a vehicle forfeited under s. 202, but not condemned, even though condemnation is asked for, under s. 226.

If no order is made under s. 226 a claim may well be made against an officer who has seized a vehicle and the question whether the vehicle was properly forfeited might have to be decided. Sect. 226 is for the protection of officers acting in the

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(1) 15 R. 995.

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execution of their duty just as much as it is for the protection of owners of goods, and those officers are entitled to have that protection. The Legislature has provided a speedy and inexpensive way of deciding the matter, and I am satisfied that the true construction of s. 226, read, as it must be, with the earlier sections of the Act, is that, on proof that the goods are liable to forfeiture, there is a duty cast on the justice to exercise his power to condemn them. In that view I am fortified by the words of Lord Blackburn in *Julius* v. *Oxford* (*Bishop of*) (1), where he says: "If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it." In the present case the justices were asked to exercise their power to condemn. In my view they were bound to make an order to that effect, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor for Customs and Excise.*
Solicitor for respondents: *W. S. Spaull.*

(1) 5 App. Cas. 214, 241.

G. F. L. B.

Distinguished. YOUNGHUSBAND *v.* LUFTIG. [1949] 2 All E.R. 72.

Considered. YOUNGHUSBAND *v.* LUFTIG. [1949] 2 K. B. 354

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Oct. 24, 25.

JUTSON *v.* BARROW.

Medical Practitioner—Unregistered Person—"Surgeon"—Use of title "manipulative surgeon"—Description of work—Medical Act, 1858 (21 *&* 22 *Vict. c.* 90), *s.* 40.

The use, by a person who is not registered under the Medical Act, 1858, nor a legally qualified medical practitioner within the meaning of the Act, of the title "manipulative surgeon" on a plate bearing his name affixed outside his house, is an offence under s. 40 of that Act.

Whitwell v. *Shakesby* (1932) 147 L. T. 157 followed.

CASE stated by Devonshire justices.

Three informations were preferred by the appellant, William Ewart Jutson, under s. 40 of the Medical Act, 1858, against the respondent, Captain Horace Barrow, alleging (1.) that the respondent unlawfully, wilfully, and falsely used the title of "surgeon," contrary to the above section; (2.) that he wilfully and falsely used the title of "surgeon" implying that he was recognized by law as a surgeon; and (3.) that he unlawfully and falsely used a title implying that he was registered under the above Act.

On the hearing of the informations the following facts were proved or admitted:—On August 30, 1934, and for some time before, the respondent was the occupier of Denby House, Belle Vue Road, Paignton. Outside the premises was a plate bearing the words "Captain H. Barrow, M.M., Manipulative Surgeon." The plate was affixed on the instructions of the respondent at some time before August 30, 1934, and was still displayed on that date. The respondent allowed himself to be described in the telephone directory as "manipulative surgeon." Affixed to his motor-car there was a plate similar to the one displayed outside his premises.

The respondent was not registered under the Medical Act, 1858. His name had never appeared in the medical register, nor was he a legally qualified medical practitioner within the meaning of the Act. He did not hold and had never held any medical degree.

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On December 22, 1933, a letter was written to the respondent by the general secretary of the Medical Defence Union pointing out that, in the opinion of the council of the union, the use by the respondent of the title " surgeon " was an infringement of the Act and asking for an assurance that he would discontinue such use. The respondent replied by letter on December 28, 1933, saying that he was not using the title " surgeon," and added : " Prove that I am not a manipulative surgeon and I will remove the title ' manipulative surgeon ' from my plate." On December 29, 1933, the secretary replied saying that the council had no alternative but to place the matter in the hands of their solicitors.

The respondent, by manual operation, treated fractures, deformations, injuries, and disorders of the bones and joints. For the past fifteen years he had used the word " surgeon," always preceded by the word " manipulative," as describing his occupation. He had used those words in Sheffield, Cardiff, and, later, in Paignton and in other places in the counties of Devon and Cornwall, which he regularly visited.

On the part of the appellant, it was contended (*a*) that the Act contained an absolute prohibition against the use of the title " surgeon " by an unregistered person ; (*b*) that the use of the word " manipulative " could not justify or legalize the use by the respondent of the word " surgeon " ; and (*c*) that the authority of *Whitwell* v. *Shakesby* (1) was conclusive against the respondent. On the part of the respondent, it was contended (inter alia) (*a*) that he did not use the word " surgeon " by itself, and that the use of the word " surgeon " coupled with the word " manipulative " was neither an unlawful or false use of the word nor the unlawful or false use of a name, title, or addition within the meaning of the Act ; (*b*) that the use of the title " manipulative surgeon " did not imply that the respondent was registered under the Medical Act, 1858 ; and (*c*) that *Whitwell* v. *Shakesby* (1) was clearly distinguishable on the facts. The respondent said on oath that he used the phrase " manipulative surgeon " to distinguish himself from the registered practitioner. He also

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(1) 147 L. T. 157.

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said that if any other name would properly describe his work he would gladly adopt that name.

The justices held that the respondent used the title wilfully within the meaning of the Act, but that such use was not unlawful in that it was used to describe the work or craft which he practised. They accordingly dismissed all three informations and allowed the respondent 50 guineas costs.

Mr. Jutson appealed.

R. P. Croom-Johnson K.C. and *G. D. Roberts* for the appellant. The justices misconstrued s. 40 of the Medical Act, 1858. (1) The mere use, by an unregistered person, of any of the names or titles specifically mentioned in the first part of the section is an offence under the section. No question of implication arises. The prohibition against the use of any of the specified names is absolute. The question of implication only arises where the use complained of is of a name, title, addition, or description not specifically mentioned in the section. The name or title "surgeon" is used in this case as a professional description, with the intention of influencing the public. The title "surgeon" is among the names or titles specifically mentioned in the first part of the section. Therefore, the use by the respondent, an unregistered person, of the title "surgeon" is an offence under the section. The respondent by describing himself as a "manipulative surgeon" has committed an offence against the section, and the case should be sent back to the justices with a direction to find that the offence charged against the respondent has been proved.

[*Whitwell* v. *Shakesby* (2) was referred to.]

Norman Birkett K.C. and *J. D. Casswell* for the respondent. The Medical Act, 1858, does not create any monopoly in the use of the word "surgeon." The use by an unregistered person of the name or title of "surgeon" is only prohibited by s. 40 of that Act if the use of that name or title implies that he is registered under that Act, or is recognized by law as a surgeon. It is a question of fact for the justices to decide,

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(1) For the words of the section see p. 240, post.

(2) 147 L. T. 157.

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in each case, whether or not the name or title used by the defendant does imply that he is so registered, or recognized as a surgeon. In this case the use of the word "manipulative" before the word "surgeon" removes any implication which would otherwise arise from the use of the word "surgeon" by itself, and the expression "manipulative surgeon" does not mean, nor was it intended to mean, a surgeon or a registered medical practitioner, and does not offend against the section. In any event, no offence against the section can be made out, unless it is proved that the unregistered person intends, by using the name or title complained of, to imply that he is registered under the Act, or is recognized as a legally qualified medical practitioner. A person cannot commit an offence under s. 40 unless he wilfully and falsely takes or uses the name or title complained of, and the expression "wilfully and falsely" means intentionally, and with intent to deceive. See *Ellis* v. *Kelly*. (1)

Croom-Johnson K.C. replied.

Lord Hewart C.J. [stated the facts set out above and continued :] It was contended on behalf of the respondent, that, as he alleged, and the allegation depended upon his sole testimony, the words "manipulative surgeon" had been for upwards of twenty years publicly and generally used to mean, and were generally understood to mean, a person not registered under the Medical Act of 1858, and not recognized by law as a surgeon carrying on the occupation in which he was engaged. He contended that those words had been publicly and generally used, by members of the medical profession and others, to distinguish unqualified persons and their occupation, from qualified and registered surgeons and their profession. He even went so far as to contend that the word "surgeon," being used in conjunction with the word "manipulative," qualified and defined the word "manipulative," or, in other words, that the substantive qualified the adjective, and he further contended that the statute contained a prohibition against the wilful and false use of the word "surgeon" by

(1) (1860) 6 H. & N. 222.

itself, or the wilful and false use of any name, title, or description implying that a person is registered under the Act, or that he is recognized by law as a surgeon, or licentiate in surgery. Indeed, it is apparent that having persuaded himself, it is to be supposed, of the truth of his contention, he said that he used these words "manipulative surgeon" for the very purpose of directing attention to the fact that he was not a surgeon within the meaning of the statute.

It was contended on the part of the appellant that the statute contained an absolute prohibition against the use of the title "surgeon" by an unregistered person, and that the use of the word "manipulative" could not justify or legalize the use by the respondent of the word "surgeon."

The case has not been stated in a very satisfactory form. There is annexed to it a transcript of the notes of evidence. It is interesting to observe that, according to those notes, the respondent said on oath that he used the phrase "manipulative surgeon" to distinguish himself from the registered practitioner. He also said that if any other name would properly describe his work, he would gladly adopt that name. It is quite obvious that there are other names which would fulfil that purpose, as, for example, as his learned counsel seemed to admit in argument, the words "manipulative healer."

The words of s. 40 of the Medical Act, 1858, are reasonably plain. The preamble to that Act begins as follows: "Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners." Sect. 40 provides: "Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognized by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding twenty pounds." It is natural to ask immediately why that section is framed in that two-fold form. It would have been quite simple to enact that any person who wilfully and falsely used any name implying that he was registered, etc., when he was not, should be liable to a penalty. The Legislature has not taken that course. It has set out in the section certain well known expressions or descriptions—" physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary "—and it is not denied, as indeed is obvious, that if for the moment the word " surgeon " is subtracted from that enumeration, every one of the other expressions there set out has this feature in common with the rest, that it is a well known professional description. And why not surgeon ? All these specific titles or names are enumerated in one phrase and treated as being on the same plane. Those specific and well known descriptions having been enumerated and protected, the section goes on by way of addition to prohibit the false user of any name, title, addition, or description, implying that the person is registered under this Act, or is recognized by law, etc. In other words, the section having prohibited the improper use of any of the well known names or titles of qualified practitioners, goes on to sweep into the net of what is forbidden any name which has the effect of implying that the unregistered person is a registered practitioner. It is quite obvious that these words beginning with " implying that he is registered," etc., are words not purporting to describe the intent of the individual, but are words describing the effect of the name, title, or addition. If that name, title, addition, or description carries with it the implication referred to in the section, it matters not what the intention of the person using it may be. The section is to protect the public, and what is regarded is not the mind of the individual but the meaning likely to be conveyed by the words that are used.

Our attention was directed in the course of the argument to the cases, not very satisfactory either in argument or in report, which have approached the present question. There was, for example, in 1860, the case of *Ladd* v. *Gould* (1), in which the justices had come to a certain conclusion of fact. The case related to a dentist. The justices were of opinion that his use of the word "surgeon" was merely to show what kind of dental business he carried on and that he was not intending to represent himself as a surgeon within the meaning of the Medical Act, 1858. All that the court decided, I think, was that there was evidence from which they might come to that conclusion, though they might have come to the opposite conclusion. That case seems to me to be no authority for anything beyond what it states.

There was a later case of *Ellis* v. *Kelly* (2), where a man who had, or thought he had, a diploma from a Bavarian University called himself simply "Dr. Kelly." What was charged against him was, not that he had wilfully and falsely assumed the name of "doctor," but that he wilfully and falsely pretended to be a doctor of medicine. On the particular facts of that case it was held that there was no evidence that he had wilfully and falsely pretended to be a doctor, because, as was said by Channell B., he had not wilfully and falsely used the title of "doctor," or, as Wilde B. said (3): "The defendant had a German diploma, which he might reasonably believe entitled him to describe himself as he did," and Bramwell B. said (4): "The 40th section is intended to guard the public against being imposed upon by a person pretending to have a qualification when in fact he has none. It applies to the case of a person using a title falsely implying that he is registered or has a title to be registered. The object is to prevent people from assuming titles in respect of a qualification when they have none." A little later he said: "Did the respondent wilfully and falsely, in other words criminally, pretend to be, or use the title of a physician? There is nothing more than this, that having a foreign diploma he chose to put the word 'Dr.' before his name," and, he said, the justices "seem to have held that the respondent might well call himself 'Dr. Kelly,' on the supposition that he had a right to do so."

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(1) (1860) 24 J. P. 357.
(2) 6 H. & N. 222.
(3) 6 H. & N. 227.
(4) Ibid. 222, 226.

It may well be that words of that kind are relevant and appropriate where the particular offence which is charged is the offence of wilfully and falsely pretending, but it may be observed that even so, on further reflection, Bramwell B. was a little doubtful of the words which he had employed in *Ellis* v. *Kelly*. (1) It appears that twelve years later, in *Andrews* v. *Styrap* (2), Bramwell B., who was a member of the Court with Martin B. and Pigott B., observed in the course of the argument, reference having been made to his observation in *Ellis* v. *Kelly* (1): "The matter does not appear to me now as it appears to have appeared to me then," in other words, he was not quite certain whether he had been accurately reported. But, however that may be, it seems to me when one looks carefully at all these cases that there is no clear judicial authority on the true interpretation of this twofold section.

In my opinion, the effect of this section is to prohibit the use of any of these named and well known descriptions except in cases where they are lawfully employed, those descriptions being physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary. If one of those well known professional descriptions is employed, I think a defendant cannot be heard to say, borrowing the later words of the section which are applicable to names and descriptions of a different character, that the name which he employed did not imply that he was registered or recognized in the sense described by the statute. If he is not a surgeon, he must not call himself a surgeon, and it seems to me to be quite idle to say that in this context the word "surgeon" is used to qualify or modify the word "manipulative." It is perfectly clear as a matter of grammar that the word "manipulative" is the adjective and the word "surgeon" the substantive. What this respondent is asserting is: "I am a surgeon, and if you ask me what kind of surgeon I am, I am a manipulative surgeon." It is a curious epithet to apply

(1) 6 H. & N. 222, 226. (2) (1872) 26 L. T. 704, 706.

to the word "surgeon." By its very name the profession of surgeon points to a person who does that which he does by means of his hands, and to say that he is a manipulative surgeon is the same as saying that he is a surgeon surgeon.

Various suggestions were made in the course of Mr. Birkett's ingenious argument by way of a reductio ad absurdum. He asked, for example, would it be unlawful for a man to describe himself as a quack surgeon? Of course, no man would do so, because the term would be contradictory. It would be equal to saying "I call myself a surgeon, but I am not." But when reference is made to expressions like "dental surgeon" and "veterinary surgeon," very different considerations apply. Dentists and veterinary surgeons are expressly protected by statute. Let me refer to an Act of Parliament which was not mentioned in the course of the argument, but which seems to me to dispose of all that type of argument and suggestion on which so much of the respondent's case appears to rest. By the Veterinary Surgeons Act, 1881, s. 17, it was provided that if after a named day "any person, other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine not exceeding twenty pounds." It is obvious that that section is deliberately framed on the scheme and system of s. 40 of the Medical Act, 1858. The use of the specific name in an improper case is forbidden. Apart from the specific name, the use of any other name, title, addition, or description having the same purport and effect is also forbidden. To suggest to us that the term "manipulative surgeon" does not come within the mischief of s. 40 of the Act of 1858 because a man may lawfully call himself a "dental surgeon" or a "veterinary surgeon," is obviously nothing to the point when one remembers that those persons are expressly protected in each case by a statute.

I am not inquiring into the frame of mind of this respondent. I take it that he is sincere, but if he desires to represent to the public that he is not a qualified surgeon it is a very unfortunate thing that he should choose the description "surgeon" preceded though it be by the word "manipulative." If he would gladly achieve the same end—namely, that of telling the public that he is not a qualified surgeon, and have a title not likely to produce that prohibited effect, there are many descriptions open to him. Apparently he does not like the name "bone-setter." Counsel seemed to be a little reconciled to the description "manipulative healer." But what does all that class of consideration involve except this, that the use of the word "surgeon" is and is thought to be desirable because of the well known and particular connotation and association of that word? The thing which makes the name "surgeon" appear to be attractive and useful is precisely the thing which this section was enacted to prevent. If the respondent is, as we must take him to be, sincere, there are many ways open to him of telling the public that he is not a surgeon other than the way of telling the public that he is a surgeon. It seems to me that this case is really beyond argument. The respondent has chosen to use the word "surgeon," the meaning of which is and is intended to be clear to the man in the street, and it matters not that he has chosen to attach to it the tautologous epithet "manipulative."

I have thought from an early stage in the discussion in the present case that it was concluded by the judgment of this Court in *Whitwell* v. *Shakesby* (1), but I should like to add one word with reference to a passage in my own judgment in that case. No support is given by the judgment in *Whitwell* v. *Shakesby* (1) to the ill reported and, it would seem, inadequately argued case of *Ladd* v. *Gould*. (2) What I was doing in my reference to *Ladd* v. *Gould* (2) in the case of *Whitwell* v. *Shakesby* (1) was to differentiate *Ladd* v. *Gould* (2) from *Whitwell* v. *Shakesby* (1), and the differentiation was that

(1) 147 L. T. 157.

(2) 24 J. P. 357.

in *Ladd* v. *Gould* (1) there was a finding of fact. I said nothing of the merits of that fact nor of that finding. All I said was (2): "There is no such finding as that in this case."

I would add this, that, speaking for myself, I cannot imagine any adjective which, being added to the title "surgeon," would excuse the use of the word "surgeon" by a person not registered or recognized as a surgeon under the Act of 1858, unless, as for example in the case of a veterinary surgeon, he is expressly protected by statute. In the present case the only fact which needed to be found was: Did this man call himself a surgeon? The answer to that question was obvious.

On the first of these informations, therefore, it is quite clear to me that on these facts these justices had in law no alternative except to convict. I think the same consideration applies to the second information. With regard to the third, if my copy of this case is correct, the information did not use the word "wilfully." On the substance of the matter it is perfectly plain to me that this appeal must be allowed and the case must go back to the justices with a direction to find that the offence which was charged was proved.

HUMPHREYS J. I agree with the judgment which has just been delivered by my Lord and for the reasons stated in that judgment, but, in justice to the interesting and forcible argument addressed to us by Mr. Birkett, and since we are differing from the justices who acquitted the respondent, I will add a few words of my own.

I understand that the three informations in this case were intended to be alternative charges, and I do not think that the respondent could be mulcted in more than one penalty in respect of one act. Therefore, in my view, it is sufficient to deal with one, and it will be convenient to deal with the first of the informations which, following the words of the Act, charged the respondent with the offence of unlawfully, wilfully, and falsely using the title of surgeon, contrary to the section.

Mr. Birkett's argument, as I understood it, was to this effect. He said that the medical profession have no monopoly

(1) 24 J. P. 357.

(2) 147 L. T. 157, 158.

of the word "surgeon," and that the use by an unregistered and unqualified person of the title "surgeon" is only prohibited by s. 40 of the Act of 1858 if the use of that title implies that he is registered under the Act or recognized by law as a surgeon. I have great difficulty in accepting that argument, having regard to the perfectly plain language of the section, and I respectfully agree with the view which my Lord has expressed that the beginning of the section makes it an offence for any unqualified person to use any of the named titles. Then the section goes on to make it an offence for any person, by the use of any title other than the named titles, to imply that he is registered under the Act. But the matter is of very little importance in this case, because Mr. Birkett conceded that the use of the word "surgeon" simpliciter would imply that the person who used it was a registered person under the Act. He went on to say, however, that it was a question of fact for the justices, in each case, to say whether the title proved to have been used by the defendant does imply, or does not imply, that he is a registered person. Up to a point that is correct, but I observe in this case that the justices have not found as a fact any answer to that question. They have not found that the use of the words "manipulative surgeon" does not imply that a person is a registered surgeon. Indeed, they seem to have carefully refrained from finding any such thing, in spite of an appeal to do so. I am far from saying, expressing my own view on the matter, that if, on the facts of this case, the justices had found as a fact that the expression "manipulative surgeon" did not imply that a person using it was representing himself to be a surgeon, this Court would not have taken the matter into their consideration and held that there was no evidence upon which the justices could come to such a finding.

Mr. Birkett's next point was that the use of the word "manipulative" in front of the word "surgeon" removed any implication which would otherwise arise from the use of the word "surgeon," and therefore that the expression "manipulative surgeon" did not mean "surgeon." I will

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deal with that argument in a moment, because I proceed now to the consideration of the third of Mr. Birkett's arguments. He said that, in any event, an offence is not committed by an unqualified person under s. 40 unless it is shown that he intends, by the use of the title which he takes, to imply that he is a registered person. I can find no words in the section which give the smallest indication that that is its meaning. There are no such words as "intent to deceive" or "intention to persuade persons that he is registered." It appears to me that the prohibition against the use of the named words and titles or of any other titles having the same implication is absolute. But for the case of *Ellis* v. *Kelly* (1), to which my Lord has referred, I should have thought that that argument of Mr. Birkett was an extravagant argument. But he supported it by reference to this case, which he urged upon us was a decision to the effect that a person could not commit an offence under this section unless he wilfully and falsely took the name and title in question, and that wilfully and falsely meant not only intentionally but also with intent to deceive. The case of *Ellis* v. *Kelly* (1) was a very remarkable one and, judging solely, as one must, by the reported facts of the case, it is a little difficult to understand why Mr. Kelly, or Dr. Kelly, as I have no doubt he was perfectly entitled to call himself, was ever prosecuted. Sect. 40, as was observed in that case and others, is a section designed to deal with unqualified persons, who, in one way or another, represent themselves to the public as being qualified, and "qualified" means registered under the Act, or recognized by law. Mr. Kelly was a fully qualified and registered medical practitioner, as much entitled to practise medicine as even the chairman of the Medical Defence Union at that date. He was the holder, and nobody doubted it, of a degree from a well known German University which entitled him to call himself a doctor of medicine, and he produced that diploma. The charge against him was that he wilfully and falsely pretended to be a doctor of medicine, and thereby implied that he was registered as a doctor of medicine. He was not registered as a doctor of medicine, but was registered under the titles of M.R.C.S. and L.S.A., which he was perfectly justified in using, and which entitled him to call himself a registered practitioner. The sole difficulty in the minds of the justices seems to have been that he did not prove his diploma to their satisfaction. For my own part, I share the difficulty which was expressed by Bramwell B. (1) in understanding why the justices did not consider that the diploma was proved. Two witnesses were called, who proved the seals of the University and of the medical faculty, and one witness expressed the opinion that the signature of the professor, who purported to sign the diploma, was the signature of a professor whose writing he knew. But for some reason or other the justices were not satisfied of the fact of the proof of that document, but, nevertheless, said that they were not going to convict Mr. Kelly of a criminal offence. It appears to me that all that the Court decided in that case was that in such circumstances the qualified registered medical practitioner, who had called himself Dr. Kelly, because in truth he was in possession of a diploma which would entitle him to call himself Dr. Kelly, was not to be convicted of a criminal offence merely because he was not in a position to prove to the satisfaction of the justices the diploma which he produced. That case is not an authority for the proposition that an unregistered and unqualified person who uses one of the terms expressly forbidden by the Act of Parliament to an unqualified person, is not to be convicted of an offence unless he intends falsely to imply that he is a registered person. That argument really amounts to this, I think, that in this case ignorance of the law must be taken to excuse the respondent. That is a proposition which this Court can scarcely accept.

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(1) 6 H. & N. 222.

In my opinion, therefore, it is not necessary to prove, in order to convict an unqualified person under this section, any intention on his part to deceive or any intention on his part to represent himself as a qualified person. In my view,

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(1) 6 H. &. N. 225.

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the section is silent with regard to any such matters, and they are quite immaterial.

To return to Mr. Birkett's argument that the use of the word "manipulative" in front of the word "surgeon" in some way prevents the person who uses that word from describing himself as a "surgeon," I do not think it necessary to consider whether there may or may not be some combination of words, including the word "surgeon," which might properly be held not to imply that the person who uses that combination of words is a registered person. In this case we have to deal with the two simple words "manipulative surgeon," and in my view, the case is concluded by a recent authority—namely, *Whitwell* v. *Shakesby*. (1) The decision in that case was that an unqualified person who described himself as a "bone-setter"—that, of course, is unobjectionable—"osteopathic physician and surgeon," committed an offence against s. 40 by the use of the words "physician and surgeon." If the description "osteopathic surgeon" is a description which implies that the person is a surgeon, how can we say that the expression "manipulative surgeon" does not imply that the person who uses it is a surgeon? Without referring in detail to the judgments in that case, in my view it is conclusive of this matter, and on that ground I hold that Mr. Birkett's argument must fail and that the justices were wrong in the view which they took. The justices said: "We were of opinion that such use was not unlawful"—I suppose that means was not wilful and false—"in that it was used in order to describe the work or craft practised by the respondent." That seems to me to be an excellent reason for saying that the respondent is entitled to describe himself as a manipulator, because that is the art or craft which he uses. But it can be no reason for allowing him to describe himself as a surgeon, which is a description in terms forbidden by s. 40 to be used by unqualified persons.

For these reasons I agree that this case must go back to the justices with a direction, if my Lord agrees, to find the offence in the first information proved.

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(1) 147 L. T. 157.

SINGLETON J. I am of the same opinion. [His Lordship stated the facts and continued:] In my view, the true reading of s. 40 of the Medical Act, 1858, is that a person commits an offence (*a*) if he wilfully and falsely uses the name or title of surgeon, and he also commits an offence (*b*) if he wilfully and falsely uses any name, title, addition, or description implying that he is registered under the Act, or that he is recognized by law, as a surgeon. Mr. Birkett argued that (*a*) is too strict a view and that no offence is committed unless the person charged is thereby implying, or seeking to get others to draw an inference, that he is so registered or recognized. In my view, there is no need to consider any such question if the name or title "surgeon" is used. The question of implication only arises on the latter part of the section in reference to the words "or any name, title, addition or description." It was argued, further, that this view would make it an offence under the section for any one to describe himself as a "veterinary surgeon" or as a "dental surgeon," but "veterinary surgeon" is a well recognized term under the Veterinary Surgeons Act, 1881, and a "dental surgeon" is well understood as one who is a dental practitioner under the Dentists Acts of 1878 and 1921. No one could think that one so describing himself was using the name or title of "surgeon" within s. 40 of the Act of 1858. The object of the Act, as stated in the preamble, is that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners, and if one can imagine a case in which the word "surgeon" was qualified by words which made it clear that the person concerned was not qualified in one of the ways stated—in other words, that he was not a surgeon in the ordinary acceptance of the term—it is possible that justices would be justified in holding that such description was not false within the meaning of the section. The only instance of such a case suggested by Mr. Birkett in argument was "quack surgeon," a description,

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or name, or title that it is difficult to think any one would use.

The respondent's plate bore the words "Manipulative Surgeon." It is impossible to hold this is not using the name or title of surgeon. The justices have found that it was wilful, and their finding of fact shows that it was false. In such circumstances the justices ought to have convicted the respondent on the first information. The name or title of "surgeon" is used, even though it is preceded by the word "manipulative," and the offence is proved. There is no finding of fact to the contrary, and if there had been I do not think it could have stood on the facts of the case as stated.

Furthermore, I am of opinion, if it be necessary to consider the matter, that by having a plate bearing the words "manipulative surgeon" the respondent was using a description implying that he was recognized by law as a surgeon, the second information. He did that wilfully, and it was false. It is not a question of what he intended, but what was to be implied in and from the description. The case seems to me to be precisely within the decision of this Court in *Whitwell* v. *Shakesby* (1), and to be covered by the words used by my Lord towards the conclusion of his judgment in that case, where he said that the respondent in that case used the words or description (2), "only because, as I think, they appear to convey that the respondent had qualifications which in fact he had not, and which the Medical Act, 1858, prevented him from assuming without the lawful right so to do." The respondent in this case knew that he was not entitled to use the name or title of surgeon simpliciter. He sought to avoid the effect of the section by putting in the adjective "manipulative," retaining the word "surgeon," which he wished to keep and use because he thought it would be attractive. None the less he is still within both limbs of the section.

I agree that the case must go back with a direction to the justices that there ought to be a conviction. I have no doubt that it was the intention of those who laid the information

(1) 147 L. T. 157.

(2) Ibid. 159.

that the offences charged, if they were proved, should be treated alternatively, and it is sufficient for the purposes of this case if there is a conviction on the first information.

Appeal allowed.

Solicitors for the appellant: *Hempsons.*

Solicitors for the respondent: *Walter Crimp & Co., for Stanley Richards & Co., Paignton.*

T. W. M.

RAILWAY AND CANAL COMMISSION COURT.

1935
Oct. 15.

NEWCASTLE-UPON-TYNE CORPORATION *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

GATESHEAD CORPORATION *v.* SAME.

Railway—Rates—Bridge vested in and maintained by railway company—Upper part of bridge carrying railway and lower part carrying roadway—Tolls taken by railway company for road traffic—Lower part of bridge, whether a "railway hereditament"—Bridge whether constituting one or separate hereditaments—Railways (Valuation for Rating) Act, 1930 (20 & 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.

A bridge which traversed a river and was vested in and maintained by a railway company and had been constructed by its predecessors under statutory requirements, consisted of an upper part carrying a railway and a lower part carrying a roadway for foot passengers and vehicles. The company was empowered to charge and did charge tolls in respect of passengers and vehicles using the roadway:—

Held, that the lower part, as well as the upper part, of the bridge was, in the circumstances, a "railway hereditament" as defined for the purposes of the Railways (Valuation for Rating) Act, 1930, by s. 1, sub-s. 3, thereof, and, therefore, that it had been properly entered in the railway valuation roll as such a hereditament.

Semble, that the two parts of the bridge were properly entered in the roll as separate hereditaments and not as one single hereditament.

APPLICATIONS by way of appeal from a determination of the railway assessment authority.

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NEWCASTLE-UPON-TYNE CORPORATION *v.* L. & N. E. RY. CO. GATESHEAD CORPORATION *v.* SAME.

The London and North Eastern Railway Company, hereinafter called "the company," were the owners and occupiers of a bridge, known as the high level bridge, which spanned the river Tyne and was partly in the rating area of which the corporation of the city and county of Newcastle-upon-Tyne were the rating authority, and partly in the rating area of which the corporation of the county borough of Gateshead were the rating authority.

The bridge was erected by the Newcastle-upon-Tyne and Berwick Railway Company, in pursuance of the Newcastle and Berwick Railway Act, 1845 (8 & 9 Vict. c. clxiii.), s. 23, which required that company to construct a bridge for carrying across the river Tyne not only a railway but also a roadway; and the bridge afterwards became vested in the North Eastern Railway Company, and was now vested in the company. The bridge had two decks, an upper deck which was exclusively used for carrying a railway; and a lower deck which was exclusively used for the purpose of a roadway consisting of a carriageway 20 ft. 4 in. in width on which a double line of tramway tracks was laid, and of two footways 6 ft. 2 in. in width.

By virtue of s. 37 of the Act of 1845 and s. 28 of the North Eastern Railway Act, 1897 (60 & 61 Vict. c. ccxxiii.), the company was empowered to charge and did charge tolls in respect of all passengers, animals, and carriages passing across the bridge by the roadway. In addition to these tolls the company was paid by the corporations the fixed annual sum of 10,000*l.* under the Newcastle-upon-Tyne and Gateshead Corporations (Bridge) Act, 1924 (14 & 15 Geo. 5, c. xcvii.), s. 62, in respect of the running of their tramway cars over the bridge. For the collection of the tolls the company maintained and occupied a toll house at each end of the lower deck of the bridge.

Before the coming into force of the next-mentioned Act the lower deck of the bridge had been assessed and rated as a separate hereditament.

By the Railways (Valuation for Rating) Act, 1930, the railway assessment authority was constituted and was required to prepare a railway valuation roll showing the net annual and rateable values of every railway hereditament; and by that Act and the Rating and Valuation Acts (Railway Valuation Roll) Rules, 1933 (S. R. & O., 1933, No. 451), r. 3, provision was made for arranging the roll in sections and divisions.

On October 31, 1934, the Railway assessment authority, hereinafter called "the authority," sent to the said corporations a copy of the part of section B. of the draft valuation roll relating to the undertaking of the company so far as it related to the lower deck of the bridge, and on March 30, 1935, they heard the representations of the corporations with respect thereto.

On May 1, 1935, the authority gave notice to the corporations that they had completed the part of the valuation roll relating to the bridge and had included therein the lower deck as a railway hereditament and that the net annual value and the rateable value thereof were nil.

The corporations made their respective applications by way of appeal under s. 9, sub-s. 2, of the Act of 1930, to the Railway and Canal Commission against that part of the roll on the ground that the lower deck of the bridge had been incorrectly treated by the authority as being a railway hereditament or a part of a railway hereditament and that the net annual value and the rateable value thereof had been incorrectly determined.

J. Charlesworth for the corporations, appellants: The railway assessment authority was wrong in determining that the lower deck of the high-level bridge was a railway hereditament.

By the Railway (Valuation for Rating) Act, 1930, s. 1, sub-s. 3 (1), "railway hereditament" means any hereditament

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(1) Railways (Valuation for Rating) Act, 1930 (20 & 21 Geo. 5, c. 24).

Sect. 1: "(3.) For the purposes of this Act—

'Undertaking' in relation to a railway company includes, in addition to the principal undertaking of the company—

(*a*) any canal, dock or harbour undertaking carried on by the company;

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occupied for the purposes of the undertaking of a railway company; and "undertaking" in relation to a railway company includes in addition to the principal undertaking any subsidiary or ancillary undertaking carried on by the company not being a transport undertaking. The appellants do not dispute that the authority was right in treating the two parts of the bridge as separate hereditaments, or in entering the upper part of it in the list as a railway hereditament. The lower part of the bridge, however, is not a "railway hereditament" within the definition of that expression, inasmuch as it is not occupied for the purposes of the undertaking of a railway company. The Newcastle and Berwick Railway Act, 1845, s. 23, no doubt authorized the predecessors of the company to construct the bridge so that it should be available not only for carrying the railway, but also for providing a roadway; but it does not follow that the roadway when provided is occupied for the purposes of the railway undertaking of the company. The lower part of the bridge may be occupied by the railway company but it is not occupied for the purpose of the undertaking of the company within the meaning of the definition, for it is not used in connection with that undertaking. The company could sell that part of the bridge to a purchaser without affecting its undertaking or interfering with its proper business. The lower part of the bridge is not a hereditament occupied for the purposes of any "subsidiary or ancillary undertaking" carried on by the company within the meaning of the definition provisions. That expression denotes an undertaking which helps the principal undertaking of the railway company by bringing traffic to the railway or otherwise; but the lower part of this

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(b) any subsidiary or ancillary undertaking carried on by the company, not being a road-transport, sea-transport or air-transport undertaking; . . . .

'Railway hereditament' means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company:

Provided that no premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament."

bridge, being a carriageway conducted by other persons, not only does not help the railway but to some extent competes against it. The lower bridge has no connection with the undertaking of the railway except that it is owned by the company. Under s. 4, sub-s. 3, of the Act of 1930, any receipts from traffic on the lower bridge would have to be deducted from the total revenue receipts of the company in order to ascertain its net receipts as a railway company.

Monckton K.C., *Trustram Eve K.C.* and *A. Tylor* for the London and North Eastern Railway Company, respondents: The railway assessment authority rightly decided that the lower part of the bridge carrying the roadway was a railway hereditament. The expression "railway hereditament" is defined in s. 1, sub-s. 3, of the Act of 1930 as "any hereditament occupied for the purposes of the undertaking of a railway company." That that definition extends to any hereditament which may be used in connection with the undertaking of the railway company appears from the proviso thereto. It is admitted by the applicants that the lower part of the bridge is a "hereditament" and that it is "occupied" by the company within the meaning of that definition. It is further a hereditament occupied "for the purposes of the undertaking" of the railway company within that definition. The sub-section defines the term "undertaking" in relation to a railway company as including the "principal undertaking" of the company and in addition thereto (inter alia) "any subsidiary or ancillary undertaking carried on by the company" except other forms of transport. The lower part of the bridge is a hereditament occupied for the purposes of the principal undertaking of the company. The Newcastle and Berwick Railway Act, 1845, s. 23, provided that the predecessors of this company should construct the bridge for carrying the railway and should so construct it that it should be available for carriages and foot passengers. The bridge as a whole is one construction. The upper part carrying the railway and the lower part carrying the roadway together constitute a single hereditament. The same pillars which support the railway support the roadway also. The

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bridge was constructed primarily as a railway undertaking, and the lower deck, being part of the bridge, is therefore in itself a railway undertaking. If the lower part of the bridge is not a hereditament occupied for the purposes of the principal undertaking of the company, then it is a hereditament occupied for the purposes of a "subsidiary or ancillary undertaking" carried on by the company within the meaning of the definition of "undertaking." These words show that the term "undertaking" is used in the Act in its widest sense, and includes every business which a railway company is authorized by statute to conduct. The term is not confined to a physical asset, but extends to any authorized business prosecuted by or for the benefit of the company. It adds to the principal undertaking of the company any collateral enterprise undertaken by it or on its behalf. As the company takes tolls from the road traffic over the lower part of the bridge the business of conducting that traffic is an undertaking subsidiary or ancillary to the principal undertaking of the company.

Erskine Simes for the railway assessment authority, respondent: The authority adopts the argument on behalf of the railway company so far as applicable. It appears from s. 1, sub-s. 3, and s. 4, sub-s. 3 (i) (*b*), of the Act of 1930, that the term "undertaking" in relation to a railway company includes every undertaking carried on by or for the company which is not expressly excluded. The lower deck as well as the upper deck of this bridge is a hereditament occupied for the purposes of the undertaking of the company. The former equally with the latter is an undertaking imposed upon the company by statute without regard to its own wishes.

Charlesworth in reply: It appears from s. 1, sub-s. 3, of the Act of 1930 that the term "undertaking" as there used is not to be understood in its widest sense. The expression "any subsidiary or ancillary undertaking" in that sub-section is not equivalent to "any other undertaking." The fact that the lower part of the bridge carrying the roadway provides income in the form of tolls for the company does not make it an "undertaking" of the company.

MACKINNON J. This is an appeal arising under the provisions of the Railways (Valuation for Rating) Act, 1930. It is provided by s. 9, sub-s. 2, of that Act that " At any time within two months after the Railway Assessment Authority have completed any part of a railway valuation roll, appeals may be brought . . . . (*b*) on the ground that the Railway Assessment Authority have incorrectly treated any premises as being, or as not being, a railway hereditament, or a part of a railway hereditament." The Railway Assessment Authority have completed a valuation roll of the London and North Eastern Railway. This appeal is brought by the corporation of Newcastle-upon-Tyne and the corporation of Gateshead alleging that the assessment authority have incorrectly entered certain premises in that roll as being a railway hereditament.

The point arises in this way. By the Newcastle and Berwick Railway Act, 1845, the Newcastle-upon-Tyne and Berwick railway was constituted and was authorized to construct a railway passing across the river Tyne by means of a bridge from Newcastle to Gateshead. By s. 23 of the Act that bridge and its nature were specified and it was provided that " the said company shall so construct the said bridge as that the same shall be available not only for the purpose of carrying the said railway across the said river, but also for providing a roadway for the passage of passengers, horses, cattle and carriages across the said river," and by s. 37 the railway company was empowered to charge tolls for passengers, horses, cattle and carriages which passed over this part of the bridge, which they were ordered to construct under s. 23. As a result of that enactment the well-known high-level bridge between Newcastle and Gateshead was constructed and in the course of time it became the property of the old North Eastern Railway Company, and is now part of the property of the London and North Eastern Railway Company. Ever since about 1850, when the bridge was completed, the use of it, with which most of us are familiar, has continued, the upper part of the bridge carrying the railway lines over which the trains pass and the lower part providing a roadway over which passengers can walk and omnibuses and other vehicles be driven.

It is the duty of the railway assessment authority under s. 3 of the Act of 1930 to prepare a railway valuation roll showing the net annual and rateable values of every railway hereditament in England, and, therefore, among others, of the hereditaments of the London and North Eastern Railway. Under other sections, which I need not refer to in detail, it is the duty of the authority to specify railway hereditaments under various classes. The method of doing so is more particularly provided for by the Rating and Valuation Acts (Railway Valuation Roll) Rules, 1933, r. 3 of which provides: " Each part of a roll shall be divided into two sections—namely, section A., in which shall be entered particulars with respect to the company's undertaking as a whole, and section B., in which shall be entered particulars with respect to every railway hereditament occupied by the company, such hereditaments being entered in separate divisions—namely (I.) hereditaments other than industrial and freight transport hereditaments; (II.) industrial hereditaments, and (III.) freight transport hereditaments." Pursuant to these provisions the authority have prepared a roll relating to the London and North Eastern Railway and they have included in it as one of the items this high-level bridge. For the purpose of carrying out the provisions in detail the assessment authority have treated the high-level bridge as consisting of two hereditaments, the upper portion carrying the trains and the lower the roadway. They have, however, entered both of them in section B. as railway hereditaments; though they have, of course, under r. 3, entered the upper part carrying the railway in division III., as a freight transport hereditament and the lower part carrying the roadway in division I., as a hereditament other than a freight transport hereditament.

The present appellants accept, and indeed insist on, the propriety of the bridge being divided into two separate hereditaments, and, though some suggestion was made by Mr. Monckton for the railway company that the whole bridge ought to be entered as one hereditament, I do not think it is necessary to go into that matter. I will assume that the authority were right, and as at present advised I think they were right, in treating this bridge as consisting of two hereditaments.

These two hereditaments, the upper deck and the lower deck, were both entered in section B. of the roll as railway hereditaments, and the ground of this appeal is that the authority were in error in that they ought not to have entered the roadway, the lower hereditament, as a railway hereditament at all. As I have said, by s. 3, sub-s. 1, of the Act of 1930, the authority have to enter on the roll every railway hereditament. What is a railway hereditament? That expression is defined by s. 1, sub-s. 3, of that Act, which provides: "For the purposes of this Act . . . . 'Railway hereditament' means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company,"—not, it is to be observed, any hereditament occupied by the railway company for the purposes of the railway, but any hereditament occupied for the purposes of the undertaking of a railway company. Now, this lower bridge is a bridge which the old railway company, the Newcastle-upon-Tyne and Berwick Railway Company, were authorized and ordered to construct under s. 23 of the Act of 1845, and I think that quite clearly the whole bridge, not only the upper part for the trains, but also the lower part for the carriages, became part of the authorized statutory undertaking of the railway company. Moreover the fact that the company were given a right to charge tolls in respect of the passage of horses and carriages over the lower bridge made it still more a part of their undertaking, for naturally one would regard these tolls as forming part of the receipts of the railway company in respect of its undertaking. I should come to the conclusion that the lower deck of the bridge is a railway hereditament solely upon the ground that it falls within the meaning of the simple words of the definition "any hereditament occupied for the purposes of the undertaking of a railway company." But when one goes on to see how that definition is both limited and expanded by the further words used by Parliament I think the point becomes even more clear. The sub-section goes on to say: "Provided that no premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament." That proviso seems plainly to imply that but for it the building in which the business of a hotel or a refreshment room was carried on by the railway company under their statutory power would be a railway hereditament. In order to prevent that result it had to be specially provided that for the purposes of the Act such premises are to be deemed not to be a railway hereditament. There is, further, in the same sub-section, not a definition, but an expansion or explanation of the meaning of "undertaking," in these words: "'Undertaking' in relation to a railway company includes, in addition to the principal undertaking of the company—(*a*) any canal, dock or harbour undertaking carried on by the company; (*b*) any subsidiary or ancillary undertaking carried on by the company, not being a road-transport, sea-transport, or air-transport undertaking." That expansion of the term indicates that the subsidiary or ancillary undertaking is to be treated as part of the undertaking of the railway company; and further, it would include, but for their exclusion, a subsidiary undertaking of the railway company in the nature of road-transport, sea-transport, or air-transport. That part of the section, like the proviso, seems to me to show that the definition of "railway hereditament" is as wide as it possibly can be, and includes, as the words say, any hereditament occupied for the purposes of the undertaking of a railway company.

I can only answer the question raised in this appeal by saying that to my mind it is quite clear in the circumstances that both parts of this bridge were occupied by the railway company for the purposes of its undertaking and, therefore, that this bridge, the whole of it and both parts of it, were rightly treated by the authority as a railway hereditament. I think, therefore, that the appeal fails.

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SIR FRANCIS TAYLOR K.C. I agree with my Lord's judgment and the reasons that he has given in support of it. I would like, however, to add that for my part I share the view, which I understood from Mr. Erskine Simes is the view of the assessment authority, that the language of ss. 20 and 23 of the Act of 1845 indicates that the railway company were compelled to construct the bridge, including the roadway, for the purposes of the undertaking. Without going through them in detail I think that that is the effect of the language of these sections. With the addition of that observation I agree with what my Lord has said.

SIR FRANCIS DUNNELL. I agree with the judgment which his Lordship has delivered and the reasons upon which that judgment is based and I have no observations to make in addition thereto.

Appeal dismissed.

Solicitors for Newcastle-upon-Tyne Corporation, appellants: *Collyer-Bristow & Co., for A. M. Oliver, Town Clerk, Newcastle-upon-Tyne.*

Solicitors for Gateshead Corporation, appellants: *Bell, Brodrick & Gray, for J. W. Porter, Town Clerk, Gateshead.*

Solicitor for London and North Eastern Railway Company, respondents: *I. B. Pritchard.*

Solicitors for Railway Assessment Authority: *Torr & Co.*

J. R.

RAILWAY AND CANAL COMMISSION COURT.

1935 Oct. 15.

CLEETHORPES URBAN DISTRICT COUNCIL *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

Railway—Rates—Pier and ornamental garden near railway station—Occupation and control by railway company under statutory authority—User only as place of recreation and amusement on charge to public for admission—"Railway hereditament"—Railways (Valuation for Rating) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.

A railway company was in occupation under statutory authority of a pier which, owing to the sea having receded, could no longer be used for purposes of transport, and of a neighbouring ornamental garden. The company used the pier and garden, which were situated not far from one of its stations, only as a place of recreation and amusement for members of the public, whom it admitted thereto on payment of a small fee:—

Held, that the pier and garden were a "railway hereditament" as defined for the purposes of the Railways (Valuation for Rating) Act, 1930, by s. 1, sub-s. 3, thereof, and that they had been properly entered in the railway valuation roll as such a hereditament.

Newcastle-upon-Tyne Corporation v. *L. & N. E. Ry. Co. Gateshead Corporation* v. *Same,* supra, p. 253, followed.

APPLICATION by way of appeal from a determination of the railway assessment authority.

The pier at Cleethorpes in the Parts of Lindsey in the county of Lincoln was originally constructed by the Cleethorpes Promenade Pier Company pursuant to the Cleethorpes Promenade Pier Order, 1867, made under the General Pier and Harbour Act, 1861, and confirmed by the Pier and Harbour Orders Confirmation Act, 1867 (No. 3).

Near to the pier an ornamental garden or pleasure ground had been laid out on or adjacent to a sea wall which was said to have been built to protect the railway line from the sea.

By the Manchester, Sheffield and Lincolnshire Railway (New Works) Act, 1881 (44 & 45 Vict. c. cxxxvi.), s. 15, the Manchester, Sheffield and Lincolnshire Railway was empowered to take, use and appropriate to the purposes of its undertaking land which comprised (inter alia) the sea wall and garden.

By the Manchester, Sheffield and Lincolnshire Railway (Additional Powers) Act, 1884 (47 & 48 Vict. c. cxlvi.), s. 39, it was provided that that railway company might purchase or lease from the Cleethorpes Promenade Pier Company the pier undertaking, and that at the time of the transfer or lease that undertaking should be transferred or leased to the railway company with all the rights, powers, authorities and privileges of the pier company.

By a lease made in April, 1884, the pier company demised the pier undertaking to that railway company, with power to make reasonable alterations in the pier and works, for a term of 999 years.

The Manchester, Sheffield and Lincolnshire Railway (Additional Powers) Act, 1886 (50 Vict. c. xlix.), by s. 46 confirmed that lease, and by s. 47 empowered that railway company to make by-laws for the regulation, management and control of the sea wall promenade gardens and works connected therewith belonging to that railway company.

The pier and garden afterwards became the property of the Great Central Railway Company, and eventually in 1921 of the London and North-Eastern Railway Company (hereinafter called " the company ").

The pier and garden were situated not far from the railway station at Cleethorpes. Owing to the sea having receded, the pier could no longer be used for transport purposes ; and the company used the pier and garden only as places of recreation and amusement for members of the public, whom it admitted thereto on payment of a small fee.

These hereditaments were situated within the urban district of Cleethorpes in the Parts of Lindsey in the county of Lincoln, for which district the Cleethorpes Urban District Council was the rating authority.

On April 27, 1935, the railway assessment authority (hereinafter referred to as " the authority "), acting in pursuance of the Railways (Valuation for Rating) Act, 1930, completed that part of the first railway valuation roll which related to the undertaking of the company, and shortly afterwards gave notice to the said Urban Council that it had done so.

On May 1, 1935, the authority, pursuant to s. 8, sub-s. 4 (*b*), of the Act of 1930, sent to the Urban Council a copy of that part of the said roll, in section B, Division 1 (Hereditaments other than Industrial or Freight Transport) of which the company was entered as the occupier of a railway hereditament within the said urban district described as "Cleethorpes Pier and appurtenances," being the above mentioned premises.

The Urban Council (hereinafter called "the appellants") made an application by way of appeal under s. 9, sub-s. 2, of the Act of 1930 from the decision of the authority to enter the company in the valuation roll as completed in respect of its occupation of the said hereditament, as being the occupier of a railway hereditament or part of a railway hereditament, the ground of the application being that the authority had incorrectly treated the said premises as being a railway hereditament or part of a railway hereditament.

The relief to which the appellants claimed to be entitled was that the said premises should cease to be treated as being or forming part of any railway hereditament and that directions should be given to the authority to amend the said entries accordingly.

In making the application the appellants stated that the pier and appurtenances were not a railway hereditament and formed no part of the railway undertaking of the company or of any dock or harbour undertaking of the company; that they were situate some distance from the company's railway line and station, and between the two undertakings were situate properties separately assessed and a public highway; and that the pier and appurtenances were used solely for the purpose of recreation and entertainment.

Comyns Carr K.C. and *Michael Rowe* for Cleethorpes Urban Council, appellants: The railway assessment authority were wrong in entering the pier and garden in the railway valuation roll as a "railway hereditament." They do not come within the definition of that expression given for the purposes of the Railways (Valuation for Rating) Act, 1930, s. 1, sub-s. 3 (1) —namely, "any hereditament occupied for the purposes of the undertaking of a railway company." The term "undertaking" in relation to a railway company, according to the definition of it given in the sub-section, includes, so far as material, only the principal undertaking of the railway company, and in addition thereto any subsidiary or ancillary undertaking carried on by the company. The pier and garden are not occupied for the purposes of the "principal" undertaking of the company. They have no connection with the railway or with the railway undertaking, but are entirely separate from it. They are used by the company only as a place of recreation and amusement for the public. Even if they bring additional traffic to the railway, they are not on that account occupied for the purposes of the principal undertaking of the company. In the absence of an express provision to that effect a canal dock or harbour undertaking would not be part of the principal undertaking of a railway company, and still less should this pier and garden be part thereof. Neither are this pier and garden a "subsidiary" or "ancillary" undertaking carried on by the company. Each of these terms as defined in the Oxford dictionary means that the thing to which it is applied is directly useful or helpful to some other thing which is regarded as of main importance; but this pier and garden undertaking is not so related to the company's railway undertaking. In this sub-section each of these terms means that the undertaking which it denotes assists the principal undertaking of the company: see per Mathew L.J. in *Green* v. *Britten and Gilson* (2), and per Buckley J. in *In re Southern Brazilian, &c., Ry. Co.* (3) The case of *Newcastle-upon-Tyne Corporation* v. *L. & N. E. Ry. Co. Gateshead Corporation* v. *Same* (4), which has just been decided, is distinguishable from the present case, because in that case the railway company was itself obliged to make the two parts of the bridge, one of which was indisputably part of the railway, and to make them as parts of one and the same construction; whereas here the pier and garden were not made by the company and were not connected with the railway either physically or as business undertakings.

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(1) See the sub-section set out in *Newcastle-upon-Tyne Corporation* v. *L. & N. E. Ry. Co.*, note 1, ante, p. 255.

(2) [1904] 1 K. B. 350, 357; 73 L. J. (K. B.) 126, 129.

(3) [1905] 2 Ch. 78, 84.

(4) Ante, p. 253.

Monckton K.C., *Trustram Eve K.C.* and *A. Tylor* for the London and North Eastern Railway Company, respondents: The railway assessment authority rightly entered the pier and garden in the railway valuation roll as a railway hereditament. The pier and garden are part of the "undertaking" of the company within the meaning of that term as defined in s. 1, sub-s. 3, of the Act of 1930. They form part of its principal undertaking. By virtue of the powers conferred upon its predecessors and through them upon itself by the Manchester, Sheffield and Lincolnshire Railway Acts, 1881 to 1886, the company is in occupation of the pier undertaking with all the rights, powers, authorities and privileges relating thereto, and is also in occupation for the purposes of its undertaking of the garden with power to regulate manage and control it. The company has thus power to use these hereditaments for its own profit and advantage and by so doing to make them part of its undertaking as a railway company. The fact that the definition of undertaking expressly states that certain things are not to be included in the term does not imply that the meaning of the term is to be cut down or that certain other things, such as this hereditament, are not to be included in it. If the pier and garden are not part of the principal undertaking they are at any rate a "subsidiary or ancillary undertaking carried on by the company." By virtue of its control over these hereditaments the company is able to, and does, render them attractive to the public and a means of increasing the traffic of the railway and thus of helping and promoting its principal undertaking. The pier and garden being thus occupied for the purposes of the undertaking of the railway company, are a "railway hereditament" within the definition of that expression given in s. 1, sub-s. 3, of the Act of 1930 for the purposes of the Act. The hereditament in question is not prevented from being a railway hereditament by reason of the fact that the pier is now above high-water mark and can no longer be used for purposes of transit, nor because it does not immediately adjoin the railway station or line, nor because it is used primarily as a place of recreation.

Erskine Simes for the railway rating authority, adopted the argument on behalf of the railway company.

Comyns Carr K.C. in reply: The term "undertaking" as defined in s. 1, sub-s. 3, of the Act of 1930 applies only to an undertaking "in relation to a railway company," that is to say, to an undertaking akin to the principal undertaking of a railway company. The object of the Act of 1930 was to exclude from the ordinary system of rating only such hereditaments as are occupied for railway purposes. This pier and garden undertaking is not occupied for such purposes. Neither the receipts from nor the expenses for it are in the nature of railway revenue or expenditure.

MACKINNON J. This appeal raises a question which is very similar to that which was raised by the last case. (1) The railway assessment authority, having issued the railway valuation roll relating to the London and North Eastern Railway Company, the Cleethorpes Urban District Council have appealed under the Railways (Valuation for Rating) Act, 1930, s. 9, alleging that the assessment authority have incorrectly treated certain premises as being a railway hereditament. One part of the premises in question is a sort of pleasure ground or garden near to the railway station at Cleethorpes, which is said to be constructed on the top of, or adjacent to, a sea wall once built by the railway company to protect the railway from the sea. The other part of the premises is a pier. Both parts of the premises are recognized by statute as having been the property of the old Manchester, Sheffield and Lincolnshire Railway Company, and as now being the property of its successor, the London and North Eastern Railway Company. Under the special Acts of the Manchester, Sheffield and Lincolnshire Railway Company of 1884 and 1886

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the railway company were given power to make by-laws to control this pleasure ground, and they were also given power to enter into an agreement with the company then owning the pier, which contained an option to purchase the pier on condition that, upon their exercising that option, the owners of the pier should have all the powers of the old company. The powers of the company which owned the pier had been created by a statute of the year 1867. The land which constitutes this garden contains on it a certain number of houses or structures, each of which is either a "hotel" or a "place of public refreshment" and some of which are "so let out as to be capable of separate assessment" within the meaning of the proviso to the definition of railway hereditament in s. 1, sub-s. 3, of the Act of 1930. The authority, in making up the roll, has excluded the premises of those two types from the category of railway hereditaments. The rest of the garden and the pier they have inserted in the roll as railway hereditaments. It is said on behalf of the appellants that the railway assessment authority were wrong in so doing. The argument was very much to the same effect as the argument on behalf of the Newcastle-upon-Tyne and the Gateshead Corporations in the previous case (1), and, as I thought in that case, so again I think here that the argument really depends upon a misreading of the words of the Act. I do not say that Mr. Comyns Carr did actually transpose the words of the definition of "railway hereditament" in the sub-section, but the whole gist of his argument rested on the basis that the words were not "any hereditament occupied for the purposes of the undertaking of a railway company," but as though they were "any hereditament occupied by a railway company for the purposes of its railway business." It is said that this pleasure garden and this pier have no connection with a railway business or the business of running a railway. If the words of the definition were in the altered form in which they seem to have been presented on behalf of the appellants there would be a great deal of weight in that argument. As I have pointed out, however, the words are not "any hereditament occupied by a railway company for the purposes of a railway," but they are "any hereditament occupied for the purposes of the undertaking of a railway company." Having regard to the Acts which now authorize the London and North Eastern Railway Company to occupy and use these gardens and pier, I see no answer to the proposition, that either separately or both together they constitute hereditaments or a hereditament occupied for the purposes of the undertaking of this railway company.

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(1) *Newcastle-upon-Tyne Corporation* v. *L. & N. E. Ry. Co. Gateshead Corporation* v. *Same*, ante, p. 253.

For these reasons I think that this appeal, like the previous one, fails, and should be dismissed.

SIR FRANCIS TAYLOR K.C. I agree. I think that the hereditament in question is a hereditament occupied for the purposes of an undertaking of a railway company—namely, the London and North Eastern Railway Company. The Manchester, Sheffield and Lincolnshire Railway (New Works) Act, 1881, s. 15, which has been read and referred to, gave statutory power to the predecessor of this railway company to buy the hereditament, and to buy it in order to use it for the purposes of the undertaking of the company, and the Manchester, Sheffield and Lincolnshire Railway (Additional Powers) Act, 1884, s. 39, in my opinion, added the rights, powers, authorities and privileges of the pier company and made the purpose of that company one of the purposes of the undertaking of this railway company. In those circumstances, I agree with my Lord's judgment.

SIR FRANCIS DUNNELL. I agree.

Appeal dismissed.

Solicitors for Cleethorpes Urban Council, appellants: *Gibson & Weldon, for A. S. Barter, Cleethorpes.*

Solicitor for the London and North Eastern Railway Company, respondents: *I. B. Pritchard.*

Solicitors for the Railway Assessment Authority, respondent: *Torr & Co.*

J. R.

C. A.

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Oct. 14, 15.

GUTSELL *v.* REEVE.

Limitations, Statutes of—Agricultural worker—Minimum wage—Contract of Employment at less than minimum rate—Action to recover difference between contract wages and minimum wages—Limit of time for making claim—Action for debt without specialty—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Civil Procedure Act,* 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3—*Agricultural Wages* (*Regulation*) *Act,* 1924 (14 & 15 *Geo.* 5, *c.* 37), *ss.* 1, 7, 16.

Under a contract of service the plaintiff was employed by the defendant as an agricultural labourer from June, 1925, to May, 1927, at a wage of 1*l.* 2*s.* 0*d.* subsequently raised to 1*l.* 3*s.* 0*d.* a week. These wages were less than the minimum wages (1*l.* 10*s.* 0*d.* and later 1*l.* 11*s.* 0*d.*) prescribed for farm workers in Sussex by the Agricultural Wages Board under the Agricultural Wages (Regulation) Act, 1924, during that period. In June, 1935, he brought the present action claiming 39*l.* 8*s.* 6*d.*, being the difference between the amount of the wages received by him from the defendant under the contract and the amount of the minimum wages to which he was entitled under the Act:—

Held, that the action was not an action for debt upon a statute, but was one based on the contract as amended by substituting for the amount provided by the contract the amount of the minimum rate of wages provided by the statute.

Held, therefore, that the action was not on a specialty, but for a simple contract debt, and was barred by the Limitation Act, 1623.

Cork and Bandon Ry. Co. v. *Goode* (1853) 13 C. B. 826 distinguished.

APPEAL from Hastings county court.

In 1925 the defendant agreed to employ the plaintiff, and the plaintiff agreed to serve the defendant as an agricultural worker in Sussex at a wage of 1*l.* 2*s.* a week. The plaintiff was so employed by the defendant from June 15, 1925, to May 9, 1927, at a wage of 1*l.* 2*s.* afterwards raised to 1*l.* 3*s.* a week. These wages were less than the minimum wages (1*l.* 10*s.* and later 1*l.* 11*s.*) prescribed for farm workers in Sussex by the Agricultural Wages Board under the Agricultural Wages (Regulation) Act, 1924, during this period, and it was admitted that the defendant should have paid to the plaintiff sums amounting to 39*l.* 8*s.* 6*d.* in addition to the wages that he paid him. This sum of 39*l.* 8*s.* 6*d.* was claimed in the action.

The county court judge found that the plaintiff knew throughout his employment by the defendant that he was being paid a lower wage than the minimum wage prescribed, and that he also knew the amount of such minimum wage.

The defendant contended that the claim was statute-barred, as a period of more than six years had elapsed between May 9, 1927, when the plaintiff was last employed by the defendant and June 1, 1935, when this action was commenced. The plaintiff admitted that the action was brought more than six years after the plaintiff's employment ended, but contended that it was not statute-barred on the ground that it was an action for debt upon a statute—namely, the Agricultural Wages (Regulation) Act, 1924, and that the period of limitation for such an action under the Civil Procedure Act, 1833, was twenty years.

The county court judge held that the action was not an action for debt upon a statute, as the plaintiff had no right of action for debt upon the statute. By s. 7, sub-ss. 3, 4 and 7, of the Act of 1924, provision was made for the recovery of sums due under the statute from an employer to a worker, but no right of action against his employer was given to a worker by any section of the statute. By s. 7, sub-s. 7, provision was made for the institution by an officer appointed by the Minister of civil proceedings on behalf of or in the name of a worker, but this action was not instituted by such an officer. The plaintiff relied on sub-s. 9 of s. 7, which preserved to a worker any right that he might have to recover the amount due to him by civil proceedings, but he did not contend that he had any right to recover the sum claimed apart from the statute and the county court judge held that the statute had not given him any right to recover it. The county court judge held accordingly that the plaintiff's claim failed on the ground that the plaintiff had no right of action against the defendant to recover the amount claimed and that if he had any right of action it was not one in respect of an action for debt upon a statute and was statute-barred.

The plaintiff appealed. The appeal was heard on October 14 and 15, 1935.

Elliot Gorst for the appellant. This action is founded on the Agricultural Wages (Regulation) Act, 1924, being a claim to recover the difference between the wages paid to the appellant between June, 1925, and May, 1927, and the minimum wages fixed by the appropriate committee under s. 2, sub-s. 1, of the Act. If the action be founded on statute, the limit of six years to the right to recover a debt imposed by s. 3 of the Limitation Act, 1623, does not apply, because the debt is a specialty debt and the limit 20 years under the Civil Procedure Act, 1833, s. 3. Sect. 7 of the Act of 1924 is the material section. By sub-s. 1 any one employing a person in agriculture is, if he fails to pay the minimum rate of wage to be "liable on summary conviction in respect of each offence to a fine." Sub-s. 3 gives a court of summary jurisdiction power in proceedings for these penalties to order the employer to pay "the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period." Sub-s. 4 gives a right to order payment of the difference for another 18 months after the conviction. Then by sub-s. 9 it is provided that the power given by this section for the recovery of sums due from an employer are not "in derogation of any right of the worker to recover such sums by civil proceedings." The claim here is therefore made under the Act with the result that it is a claim upon a specialty: *Cork and Bandon Ry. Co.* v. *Goode* (1); *Aylott* v. *West Ham Corporation* (2).

Notwithstanding the express provision with regard to police court proceedings, sub-s. 9 leaves civil proceedings open, and they also may be brought, under the Act, to assert a right to a minimum payment which arises solely under the Act.

[LORD WRIGHT M.R. Is not the true effect of the Act to vary the contract of service by striking out the wages specified and inserting the minimum wage?]

That is not what the Act provides. The statute steps in and regulates the relationship between employer and workman, and it is by reason of the relationship created by the Act that the debt sued for arises.

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(1) 13 C. B. 826.

(2) [1927] 1 Ch. 30.

Horton-Smith for the respondent. The judge was right in holding that these proceedings were not maintainable. It is contended : (1.) that the right of action was given to the workman by the statute ; (2.) that he is estopped from bringing this action, since where a statute which creates a liability gives a particular method of enforcing it, that method must be adhered to.

[LORD WRIGHT M.R. There is an express provision here to the contrary in s. 7, sub-s. 9.]

(3.) That even if the workman was entitled to bring civil proceedings he is a party aggrieved within the Civil Procedure Act, 1833, and the proceedings are subject therefore to the limit of two years ; (4.) that if this be not so, the action is for debt within the Act of 1623, and a six years' limit is applicable ; and (5.) that the action is really brought in respect of a contract of service without a specialty.

It is only when an action is based on a statute and nothing else that it is possible to say that the action is founded on a statute : *Cork and Bandon Ry. Co.* v. *Goode* (1).

Tobacco Pipe Makers' Co. v. *Loder* (2) shows the distinction between a debt grounded upon a specialty and one arising out of a statute.

In *Shepherd* v. *Hills* (3) it was held that an action in respect of certain rates and duties imposed by statute, being on a specialty, the period of limitation was twenty years under the Act of 1833.

The principal case in which the point in the present arose is *Cork and Bandon Ry. Co.* v. *Goode* (4). There it was held that an action for debt by a railway company against one of its members, for calls under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the company's special Act was an action founded upon a statutory liability ; and therefore that a plea "that the action is founded upon contracts without specialty, and that the alleged causes of action did not, nor did any or either

(1) 13 C. B. 826, 827, 829.

(2) (1851) 16 Q. B. 765.

(3) (1855) 11 Ex. 55.

(4) 13 C. B. 826.

of them, accrue within six years before the suit" was a bad plea—the proper limitation being twenty years by the Act of 1833. That case, however, is distinguishable from the present on the ground that the relationship between the parties in this case was not based upon statute, the Agricultural Wages (Regulation) Act, 1924, but on contract. The word "employment" in that statute means employment under the contract of service. See also *Mayor, &c., of County Borough of Salford* v. *County Council of Lancashire* (1); *Thomson* v. *Lord Clanmorris* (2); *Aylott* v. *West Ham Corporation* (3).

It is because a contract was entered into that the plaintiff has a right of action. The action is therefore not on the statute of 1924 but on the contract as amended by that statute. The statute of 1924 did not impose the liability in toto and therefore the Act of 1833 does not apply. The plaintiff cannot therefore come to the Court after the expiration of eight years after he has left the defendant's employ and claim the difference between the amount fixed by the contract and the amount given by the statute.

Elliot Gorst in reply referred to *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (4).

LORD WRIGHT M.R. This case raises a question of some interest and one on which both learned counsel who have addressed this court so fully and so comprehensively have agreed there is no precise authority. The question is whether the claim is one which carries with it a statutory period of limitation of six years or a period of limitation of twenty years; in other words, whether the claim is one which comes within s. 3 of the Civil Procedure Act, 1833, the material words of which are: "Actions of covenant or debt upon any bond or other specialty," in which case the period of limitation is twenty years, or, on the other hand, whether it falls within the words of s. 3 of the Limitation Act, 1623: "Actions of debt grounded upon any lending or contract without specialty," in which case the period of limitation is six years.

(1) (1890) 25 Q. B. D. 384.
(2) [1900] 1 Ch. 718, 728.
(3) [1927] 1 Ch. 30.
(4) (1877) 2 Ex. D. 441.

The appellant, who was plaintiff in the court below, was employed by the defendant as an agricultural worker for a period between June, 1925, and May, 1927. He is claiming in respect of what he alleges were under-payments made to him in respect of wages during that period. It is, therefore, clear that unless he can bring his case within the Act of 1833, his claim must be statute-barred, because if it falls within the statutory period under the Act of 1623 he is clearly out of time. He was employed as an agricultural worker at wages of 22*s.* a week, that is to say, that was the express arrangement between him and the defendant. At that time, in June, 1925, the statutory rate of wages for agricultural workers under the Agricultural Wages (Regulation) Act, 1924, to which I shall refer later, was 30*s.* The plaintiff and the defendant apparently agreed on 22*s.* because the man was receiving 8*s.* disability rate at the time. In October, 1925, the statutory wages were increased by 1*s.* to 31*s.*

The plaintiff left the employment in May, 1927. He brought his action on June 1, 1935, alleging that the proper rate of wages which he ought to have received during the period in which he was employed was either at the rate of 30*s.* a week or, a little later, at the rate of 31*s.* a week. He claimed the difference between what he was paid and what he says he ought to have been paid, and that difference amounted to a total of 39*l.* 8*s.* 6*d.* It was not disputed that, subject to the Statute of Limitations, the claim was good. The question therefore arises whether the plaintiff is entitled to claim that he comes within the definition of the Act of 1833—that his action is an action of "debt upon any bond or other specialty."

The old forms of action have now been abolished and, therefore, the claim of the plaintiff is not specifically laid in debt. I have assumed, without deciding it, that the claim is in debt because it is apparent on the face of the Act of 1833 that that Act only applies to actions which can be framed in debt; so that under the modern pleading the plaintiff may say it is a claim in debt, if he so minds. That leaves the essential question to be decided—whether it is an action of debt upon any bond or other specialty.

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The case made by the appellant is that his claim is a claim under the Agricultural Wages (Regulation) Act, 1924 (to which I shall refer as " the Act "), and on that ground comes within the Act of 1833. I must deal shortly with the relative provisions of the Act of 1924, the first of which is to be found in s. 2, sub-s. 1. That gives a power, subject to the provisions of the Act, for agricultural wages committees to fix minimum rates of wages for workers employed in agriculture for time work and, if necessary or expedient, for piece work. The minimum wages of 30*s.* and a little later of 31*s.* were duly fixed by proper committees in accordance with the Act. Sect. 7 provides as follows: " (1.) Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act "—that was necessary under other sections—" any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and, if he fails to do so, shall be liable on summary conviction in respect of each offence to a fine . . . ." By sub-s. 2: " In any proceedings against a person under this section it shall lie with that person to prove that he has paid wages at not less than the minimum rate." Sub-s. 3 gives a court of summary jurisdiction, which deals with the prosecution for penalties under sub-s. 1, the power in these proceedings, whether there is a conviction or not, to " order the employer to pay in addition to the fine, if any, such sum as may be found by the court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period." Sub-s. 4, which contains similar provisions, though less limited in their application, provides: " Where an employer has been convicted under this section "—it is limited to a case of an actual conviction—" for failing to pay wages to any worker at not less than the minimum rate applicable, then, if notice of intention so to do has been served with the summons, warrant, or complaint, evidence may be given

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of any failure on the part of the employer to pay wages to that worker at not less than the minimum rate applicable to him at any time during the eighteen months immediately preceding the period of six months mentioned in the last preceding sub-section, and on proof of the failure the court may order the employer to pay " the difference between the amount actually paid and the amount that ought to have been paid during those eighteen months. By sub-s. 9 of s. 7: " The powers given by this section for the recovery of sums due from an employer to a worker shall not be in derogation of any right of the worker to recover such sums by civil proceedings." That clearly means that the special remedies under sub-ss. 3 and 4 are not to be exclusive and are not to bar the worker from proceeding, if he is so minded, by ordinary civil proceedings. It leaves him free to recover by civil proceedings any amount (as he is seeking to do here) to which he is lawfully entitled in accordance with the Act. Sub-s. 10 of s. 7 states: " Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void." By sub-s. 11 the Court is given power, subject to the various limitations and prohibitions, to " reckon as a payment of wages such amount as in the opinion of the court represents the value of any benefits or advantages (not being benefits or advantages prohibited by law) received by a worker under the terms of his employment."

It is obvious, in looking through these sections, particularly s. 7, that the whole basis of the Act is that there should be an employment. By s. 2, sub-s. 1, the minimum rates are to be for workers employed in agriculture. By s. 7, sub-s. 1, the minimum rate of wages is to be effective against any person who employs the worker; by sub-s. 3 the proceedings referred to are to be those against an employer, and the same is true of sub-s. 4; by sub-s. 9, the sums to be recovered are to be those due from an employer to a worker; sub-s. 10 refers to an agreement of employment; and sub-s. 11 also refers to the terms of the worker's employment. In s. 16, sub-s. 1, the definition section, it is stated: " The expression ' employment ' means employment under a contract of service or apprenticeship, and the expressions ' employed ' and ' employer ' shall be construed accordingly."

I have referred to this specifically now because I want to emphasise the importance of this matter a little later. The question is whether the action is an action of debt upon a specialty; and if the claim is a claim under the statute it is, within the meaning of the expression, a claim upon a specialty. What is meant by that is very carefully discussed in a leading case, *Cork and Bandon Ry. Co.* v. *Goode* (1), on which counsel for the appellant very properly relied. In that case the defendant was the holder of thirty shares in the railway company, and he was sued in respect of nine calls. The declaration set out that an action had accrued to the company by virtue of the Companies Clauses Consolidation Act, 1845, and the Cork and Bandon Railway Act, 1845, " but," the declaration went on, " the defendant had not paid the same, or any part thereof." To that there was a second plea, " that the action is upon contracts without specialty," and that the alleged causes of action did not accrue within six years before the suit. " To this plea the plaintiffs demurred, the ground of demurrer stated in the margin being, that the Statute of Limitations referred to by the second plea, and therein pleaded, was not pleadable to the causes of action declared on." It was held that that plea was a bad plea, because the proper limitation for such an action was twenty years under the Act of 1833.

I draw attention to the form of the declaration there, which simply sets out that the defendant was the holder of thirty shares whereby an action had accrued to the company by virtue of the two Acts referred to. That is the whole of the case and nothing more. It was held, as I say, that that was an action upon the statute (or statutes) and therefore upon the specialty; and some observations made by the judges in the course of the argument are very significant. I will not refer to them all, but Maule J. said to the counsel for the plaintiffs (2): " You say that the facts stated here do not shew any contract, except for the statute ? " and counsel naturally

(1) 13 C. B. 826.

(2) Ibid. 829.

agreed. Then Cresswell J. said (1): "What is the contract between the shareholders and the company? When is it made? and how? By writing, by word of mouth, or by instrument under seal?" Maule J. asked (1): "Where is the shareholder's undertaking to pay calls but for the statute?" and it is answered by counsel for the defendant: "It must be conceded that there is none." Maule J. said: "Then he undertakes by the statute. Is an action brought upon that undertaking an action upon a contract without specialty?" obviously answering it in the negative. There are other passages to the same effect; and in the judgment itself, Jervis C.J. said (2): "But for the Act of Parliament, no action could be brought by the company against one of its own members." That, I think, is limited to the matter in debate—namely, an action for calls. "This therefore is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute." Maule J., to the same effect, said (3): "It is manifest, upon reading the declaration, that it is a declaration in debt upon these two statutes. Now, a declaration in debt upon a statute, is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability, are facts dehors the statute: that must constantly arise in actions for liabilities arising out of statutes. That appearing to be so, the allegation in the plea, that the action is upon contracts without specialty, is a false allegation of a matter of law." The learned judge there, when he said that the facts which bring the defendant within the liability were facts dehors the statute, was merely referring, as I understand it, to the circumstance that the defendant must have become a shareholder. Once he had become a shareholder, then the statute applied and defined the whole of his contract and all the rights and liabilities which flowed from it. Maule J. went on to say (3): "There may, undoubtedly, be cases where a statute enables an action to be brought, which nevertheless is not an action on the Act of Parliament. But the question is, whether that state of things exists here. I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty." Those words, as I shall show in a moment, are of first-rate importance. Then the judge pointed out: "Whether assumpsit or case would lie, leaves altogether untouched the question whether this plea is an answer to this action." Cresswell J. said (1): "This is plainly an action upon a statutory liability to pay the calls"; and Talfourd J., being of the same opinion, said (1): "The relation between the shareholders and the company is the creation of the Act of Parliament. The action is in terms founded upon the Act of Parliament, and consequently an action upon a specialty within 3 & 4 Will. 4, c. 42, s. 3."

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(1) 13 C. B. 831.
(2) Ibid. 834.
(3) Ibid. 835.

Does that case cover the present case? In my judgment, it does not. The question here, which can only be determined by looking at the Act in connection with all the circumstances of the case, shows something entirely different. There is, here, as I think, a contract of service between the plaintiff and the defendant, a contract of employment entered into in June, 1925, at a time no doubt when the Act was in force. But that was a contract which contained many terms besides the mere question of what wages were payable, and it is on that contract that the plaintiff is here suing. He seeks to isolate the question of wages, saying that that is a matter which arises in abstracto, and he contends that his right to wages is the right in the Act and arises from nothing else, and that no other part of the relationship into which he entered with his employer can be considered. But I think that that construction is entirely unwarranted. It is clear that the contract of employment must contain many other conditions, many other terms. That is contemplated in sub-s. 11 of s. 7, and throughout, by the fact that the whole position depends on a relationship of employer and employed, the scope of which cannot be limited to the mere amount of wages payable. It is true that under s. 7, sub-s. 10, there is a provision that "Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void,'' but that does not say that the employment as a whole—that is to say, the contract of employment as a whole—shall be avoided. On the contrary, s. 7 contemplates that the relationship of employer and employed continues even though the employer has not been paying the proper rate of wages. That is made perfectly clear by looking at sub-ss. 1, 3, 4 and 5, of s. 7, where the employer who has failed to pay the proper rate of wages is still treated as the employer, and must be so treated in all respects, except in regard to matters of wages.

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(1) 13 C. B. 836.

In my judgment, the effect of sub-s. 10 is merely to provide that where there is a contract of employment one item under the terms of that contract is to be, as it were, reconstructed by striking out the rate of wages, where it is lower than it ought to be, and by inserting the proper rate of wages in accordance with the statute. It is not contended that the whole agreement, or the whole employment, is to be abrogated and swept aside. If that is the true position, then I think it is clear that the matter stands outside the ruling of *Cork and Bandon Ry. Co.* v. *Goode* (1). As I have already said, once the defendant there had become a shareholder the whole scope of his rights and duties and liability arose under the statute and nothing else. There was nothing outside the statute to which reference could be made, and, therefore, the claim against him was a claim upon the statute. But here the claim is on the basis of the whole contract of employment, which is a contract involving many terms, and the only effect of the statute on that contract is to insert, against, it may be, the overt agreement of the parties, the proper rate of wages and to eliminate the improper rate of wages, and in that way the worker, suing on the contract and not upon the Act, is able to claim that he should be paid the proper rate of wages. His claim is really for 30*s.* or 31*s.* at the various appropriate dates, with a set-off against that of the amounts which he has actually received, and that, as I say, is a claim on the contract as amended by the statute.

We have been referred to a number of authorities which

(1) 13 C. B. 826.

seem to throw some light on the general position and, as I think, support the view which I have already expressed, but none of these authorities seems to determine the question which is now before this Court or to settle the problem which I have attempted to solve. I will not refer to cases before *Cork and Bandon Ry. Co.* v. *Goode.* (1) In *Salford Corporation* v. *Lancashire County Council* (2) it was held that the action there could not be an action in debt at all, but could only be an action on the case ; and if it could not be an action in debt, still less could it be an action for debt on a statute. The matter was really decided on a quite different ground. It was a claim against the justices of the county by the borough council for the payment of certain moneys which, under a statute, the borough might claim to have recouped to them. But the claim, being against the justices, was not a claim in debt or a personal claim ; it was a claim to be refunded either out of a particular fund which the council had or out of a rate which the council might raise to meet this expenditure if the fund were not sufficient. The substance of the decision was that that was a claim which could only be enforced by mandamus. In *In re Cornwall Minerals Ry. Co.* (3) the claim was for interest on debenture stock, and it was held, as I read it, on the same principle as that which was laid down in *Cork and Bandon Ry. Co.* v. *Goode* (1), that the liability was purely statutory and that the period of limitation was twenty years. *Thomson* v. *Lord Clanmorris* (4) dealt with a claim under s. 3 of the Directors Liability Act, 1890, to recover from the directors compensation for loss or damage sustained by the plaintiff on the ground that untrue statements were contained " in the prospectus of the company on the faith of which the plaintiff had subscribed for shares." That Act was passed to obviate the conclusion arrived at in *Derry* v. *Peek* (5), as to the liability of directors, and was to put their liability in certain circumstances on negligence instead of leaving it, as had been the case before, as a liability only for deceit. The Act by s. 3,

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(1) 13 C. B. 826.
(2) 25 Q. B. D. 384.
(3) [1897] 2 Ch. 74.
(4) [1900] 1 Ch. 718.
(5) (1889) 14 App. Cas. 337.

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sub-s. 1, which is the important one, provides that the director should, in the events specified in the Act, be liable to pay compensation to all persons who subscribed for shares, debentures or debenture stock on the faith of the prospectus. That was a liability in one sense created by the statute and in one sense it might be said to be a liability upon the statute; but it clearly was not a case on the same footing as *Cork and Bandon Ry. Co.* v. *Goode.* (1) Vaughan Williams L.J. pointed that out very clearly, and I need only read one short passage from his judgment (2): " But it is said that this is not an action on the case, but an action on the statute, and *Cork and Bandon Ry. Co.* v. *Goode* (1) is relied on. But it must be remembered that there the action was for a statutory debt, and the sole question was whether that debt was, within the terms of s. 3 of the statute of James, 'grounded on a contract without specialty.' It does not seem to me that that decision is really material to the case now before us. Maule J. pointed out that there is a difference between an action which is given by a statute and an action on the statute." These words, I venture to think, are most relevant here. In this present case, the action for the 30*s*. or 31*s*. a week is given in one sense by the statute, because unless the statute had fixed the wages of the employment at those figures no action could have been brought for those figures. But, in my opinion, it is not an action on the statute; it is an action on the contract of employment which is affected in respect of the rate of wages in that manner. Then the Lord Justice went on to add, in *Thomson* v. *Lord Clanmorris* (2): " *Cork and Bandon Ry. Co.* v. *Goode* (1) was an action of debt on the statute." These are very important words from that great judge.

Aylott v. *West Ham Corporation* (3) again was, on the facts, very different from the present case. It arose from a resolution of the council of the West Ham Corporation in September, 1914, to the effect that if their employees, married or single, were called up or volunteered for service with the Forces they should be granted " full civil pay." The plaintiff came

(1) 13 C. B. 826.
(2) [1900] 1 Ch. 718, 728.
(3) [1927] 1 Ch. 30.

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within that definition. He was granted full civil pay, and when he brought this action in 1925 he claimed that he had not received full civil pay, because although he had been paid the difference between his army pay and the rate of pay which he was getting at the time when he was called up in 1914, that was not " full civil pay " within the meaning of the resolution, since various increments would have been added to his pay from time to time, and he claimed that those extra amounts ought to be paid to him in order to fulfil the obligation of the West Ham Corporation. It was clear that in 1914 the resolution and promise to pay the full civil pay was ultra vires the corporation, but they were given the necessary power by the Local Government (Emergency Provisions) Act, 1916, and that Act was retrospective. But it is clear that the Act was merely permissive. It retrospectively gave power to the local authority, which they had not originally possessed, to make such a contract. But unless and until they did make a contract the question of the validity of that contract could not arise. The claim of the plaintiff in that case was not therefore based upon the permissive statute, it was based upon the promise, the contract, contained in the resolution, or at least contained on one side in the resolution and on the other in the corresponding act on the part of the plaintiff in going into military service in accordance with the resolution. Therefore, the relevancy of the Act was merely to get rid of the objection that the promise to pay full civil pay was ultra vires, and on that ground it was held by Romer J. (as he then was) and by the Court of Appeal that the plaintiff could only recover such increments and pay as became payable in the six years preceding the issue of the writ in the action, and *Cork and Bandon Ry. Co.* v. *Goode* (1) was distinguished.

There are, however, some observations which are somewhat helpful in dealing with the present question. Romer J. said this (2): " Had the Act of 1916 been in force at the time that the plaintiff enlisted in reliance upon the resolution of the defendants' Council, the action would without doubt have been one founded upon simple contract, even though the power of the defendants to make the contract would have been derived from the Act." He observed in respect of *In re Cornwall Minerals Ry. Co.* (1), to which I have already referred (2): "There again, however, there was no contract by the company to pay the interest. Its liability to do so was to be found in the statute and in the statute alone." Then, after referring to other cases, he said (3): "If, at the time the plaintiff enlisted, the Act of 1916 had been in force, his action would have been brought upon the simple contract subsisting by reason of the offer contained in the defendants' resolution, and the acceptance of that offer by the plaintiff," and having arrived at that conclusion, he discussed the Act and said (4): "It"—that is, the Act—"provides in effect that the contract entered into with a servant of the former class is to be binding on the authority to the extent (though only to the extent) to which it would have been binding if the provisions of the Act had then been in force. It seems to me to follow from this that for the purpose of considering the rights and liabilities of the parties to such a contract I am to treat it as though, at the date it was entered into, the provisions of sub-s. 1 had been in force."

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(1) 13 C. B. 826.

(2) [1927] 1 Ch. 30, 39.

The Court of Appeal in *Aylott* v. *West Ham Corporation* (5) put the matter in very much the same way, and Warrington L.J., if I may refer to a short passage in his judgment, said (6): "The contention is that, inasmuch as the Act made the antecedent promise for the first time binding on the Corporation, therefore the action upon that promise is an action upon the statute. In my opinion that is an entire misconception of the effect of the statute. The action is an action on the contract, upon the promise made in 1914. Without that promise there would be no action at all. All that the statute does is to make that promise binding so that, in case it is not performed, an action may be brought upon it." The learned Lord Justice there is distinguishing between an action brought upon a statute and an action which can only be brought because of some provisions of a statute which have made the promise enforceable. I think the same is true of a case like the present, where the effect of the statute upon a contract has been to alter or amend one term of that contract—a very material term no doubt, but one term of the contract—that is to say, the rate of wages payable under the contract.

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(1) [1897] 2 Ch. 74.
(2) [1927] 1 Ch. 30, 41.
(3) Ibid. 44.
(4) [1927] 1 Ch. 45.
(5) [1927] 1 Ch. 30.
(6) Ibid. 53.

In my opinion, this is not an action brought upon a specialty—that is to say, upon a statute within the meaning of the Act of 1833—and I think that the appeal should be dismissed with costs.

ROMER L.J. The question which arises upon this appeal may be stated in this way: Is the plaintiff bringing an action on the statute of 1924, or is he merely suing in respect of a cause of action given to him by that statute? In my opinion he is merely suing on a cause of action given him by the statute.

It is quite true that s. 7, sub-s. 1, of the Agricultural Wages (Regulation) Act, 1924, does in terms purport to impose on the employer a liability to pay wages at the minimum rate, but as I ventured to point out, in *Aylott* v. *West Ham Corporation* (1), the fact that a liability to make a payment is imposed by an Act does not necessarily lead to the conclusion that an action brought to enforce such a liability is an action upon a specialty—that is, an action upon the statute. Whether it is or is not an action on the statute depends upon the wording of the particular statute. A good illustration of that is to be found in *Thomson* v. *Lord Clanmorris*. (2) The statute there in question was the Directors Liability Act, 1890, which by s. 3, in terms at any rate, purported to impose on directors, and other persons who authorized the issue of a prospectus, a liability to pay compensation to those persons who subscribed for shares on the faith of such prospectus, and who suffered loss or damage by reason of untrue statements therein contained. In that case the question was debated—it did not become necessary to decide it—whether an action brought by a person who had been deceived by a prospectus to recover compensation from directors who had authorized the issue of the prospectus, was an action upon the statute, or whether it was an attempt to enforce a cause of action given by the statute. Vaughan Williams L.J. expressed the opinion that, notwithstanding the words of the section, the section merely imposed a new statutory duty upon directors and gave to the persons who had been damaged or misled by the prospectus a new cause of action against the directors. But, for the purpose of deciding that question, he said (1): "One must consider what is really the nature of the enactment contained in s. 3 of the Directors Liability Act, 1890."

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(1) [1927] 1 Ch. 30, 41.

(2) [1900] 1 Ch. 718.

Therefore, for the purpose of deciding the question on this appeal, it is necessary to consider the wording of the section which it is said creates the liability. The section in question is s. 7, but before reading it I should like to refer to the definition clause, sub-s. 1 of s. 16, which states: "The expression 'employment' means employment under a contract of service or apprenticeship, and the expressions 'employed' and 'employer' shall be construed accordingly." Bearing that definition in mind, I now read s. 7, sub-s. 1: "Where the minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs under a contract a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate." Sub-s. 10 of that section provides: "Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void." In my opinion the true effect of s. 7 is that, in all contracts of employment of a worker in agriculture where the wages fixed by that contract are less than the minimum rate of wages ordained by the Agricultural Wages Board, there shall be substituted in the contract for the wages provided by the contract the minimum rate of wages mentioned in the Order of the Agricultural Wages Board, and the provision in the contract fixing wages less than that minimum wage

(1) [1927] 1 Ch. 727.

is rendered void under sub-s. 10. That I think is the natural meaning of the section.

There are words in the section which seem to me to confirm the view that an action, such as the present one, is not an action brought on the statute. For if it were, it must be an action or a proceeding under s. 7. But if one looks at sub-s. 3 of s. 7 it becomes apparent that in the view of the Legislature no proceedings under the section can be taken, except proceedings of a criminal nature, that is to say, proceedings to recover the fine which is imposed by s. 7, sub-s. 1, in respect of an offence against the sub-section. I will not examine sub-s. 3 further than to say it is really apparent, if that sub-section be read carefully, that the Legislature contemplates that the proceedings under the section are proceedings of a criminal nature and not otherwise. Proceedings in respect of the cause of action given by the section are dealt with, as I read the sub-section, by sub-s. 9, which provides: "The powers given by this section for the recovery of sums due from an employer to a worker shall not be in derogation of any right of the worker to recover such sums by civil proceedings"; the right, in other words, to sue upon the contract as altered by the statute is in terms preserved.

I think the view which I have taken of the construction of the Act is further confirmed by this consideration: supposing that at the time the first Order of the Agricultural Wages Board came into operation a worker in agriculture was employed at a weekly wage of 30*s*. Certainly up to the time the Order came into force the only liability of the employer to pay that wage was a liability under the contract. Could it be said that from the moment the Order came into force the employer was under two liabilities, a liability to pay 30*s*. under the contract and another liability to pay 30*s*. under the statute? It would be ridiculous to make any such suggestion. Then when the second Order of the Board came into force and the minimum wage was 31*s*., could it really be said that as from that date the employer was under two liabilities—a liability to pay 30*s*. under the contract and a liability to pay 31*s*. under the statute? That also appears to me to be ridiculous.

In both cases the liability of the employer was one, and one only—namely, a liability under his contract to pay the wages of the worker, not as fixed in the contract, but as altered and fixed by the statute.

For these reasons, in addition to those given by the Master of the Rolls, I think that this appeal fails.

EVE J. This action is founded only on the contract of employment, and I agree that the proper statutory limitation applicable to the case is that created by the statute of 1623, and there is no room, in my opinion, for the application of any other principle. I agree that this appeal fails, and must be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitor for appellant: *Harold Eves.*

Solicitors for respondent: *Dixons, Ward, Umney & Burdon for F. W. Morgan, Hastings.*

W. I. C.

CARRAS v. LONDON AND SCOTTISH ASSURANCE CORPORATION, LIMITED.

C. A.
1935
Oct. 25, 28, 29, 30;
Nov. 15.

[1931. C. 2484.]

Insurance (Marine)—Freight—Vessel stranded—Abandoned to hull underwriters—Payment by hull underwriters for total loss—Vessel refloated by salvors—Ship surrendered to salvors in discharge of claim—Vessel unable to proceed to Port of Loading before cancelling date—Total loss of freight—"Constructive Total Loss"—Expression inapplicable to freight policy—Institute Voyage Clauses—Freight, cls. 4, 5*—Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 60, *sub-ss.* 1 *and* 2; *s.* 91, *sub-s.* 2.

Under a charterparty dated September 16, 1930, the plaintiffs' steamship was to proceed to Valparaiso to load cargo. The charterparty contained the usual exceptions including perils of the sea and the cancelling date was specified as November 20, 1930.

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Carras v. London and Scottish Assurance Corporation.

The plaintiffs took out a policy for 4000*l.* part of 9000*l.* on freight and/or chartered freight and/or anticipated freight. The policy was subject to the Institute Voyage Clauses—Freight, which provide by cl. 4: " In the event of the total loss, whether absolute or constructive, of the vessel, the amounts underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered"; and by cl. 5: " In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value. . . . ."

On November 13, 1930, the steamer, while proceeding to Valparaiso through the Straits of Magellan, stranded, and on November 17, 1930, the vessel was abandoned to the hull underwriters. The steamer was eventually refloated and brought by salvors to Magallanes, and on June 17, 1931, while she still lay at Magallanes, the hull underwriters compromised for a total loss, the owners retaining the ship but remaining liable to the salvors. Eventually the ship was surrendered to the salvors in discharge of their claim, and it was sold by them and repaired in 1932. The actual value of the ship when repaired was 13,000*l.*, but the insured value under the policy on ship was 30,000*l.* The cost of repairs exceeded 13,000*l.*, but was less than 30,000*l.*:—

Held, that as, owing to perils of the sea, the ship could not make the cancelling date or be tendered according to contract to the charterers at Valparaiso, there was an actual total loss of freight.

But if there had not been an actual total loss, the test whether the freight insurers would be liable as on a total loss would be analogous to that applicable to a ship policy in determining whether there had been a constructive total loss of ship. At the same time the expression " constructive total loss " has no application to a freight policy and cl. 5 of the Institute Voyage Clauses—Freight was therefore inapplicable in determining whether there was a total loss of freight, because the damage resulting to the ship from a peril of the sea could not be repaired except at a cost which the shipowners could not reasonably be required to incur.

Moss v. *Smith* (1850) 9 C. B. 94, and *Assicurazioni Generali* v. *s.s. Bessie Morris Co.* [1892] 1 Q. B. 571; [1892] 2 Q. B. 652 applied. Statement of Collins J. in the latter case [1892] 1 Q. B. 580 explained.

Decision of Porter J. reversed.

APPEAL from Porter J.

The following statement of the facts is taken substantially from the judgment of Lord Wright M.R.

The plaintiffs sued as owners of the Greek steamship *Yero Carras* on a policy underwritten by the defendants for 4000*l.* part of 9000*l.* upon freight and/or chartered freight and/or anticipated freight. The appeal is from the judgment of Porter J., who dismissed the action.

The steamer, while proceeding from Monte Video to Valparaiso through the Straits of Magellan, stranded on November 13, 1930. She was eventually refloated and brought by salvors to Magallanes. On November 17, 1930, the vessel was abandoned to the hull underwriters. On June 17, 1931, while she still lay at Magallanes, the hull underwriters compromised for a total loss by paying 100 per cent. and a proportion of sue and labour charges, the owners retaining the vessel, but remaining liable to the salvors. Eventually the vessel was surrendered to the salvors in discharge of their claim, was sold by them and was repaired in 1932. At the time of the casualty the steamer, as already stated, was proceeding to Valparaiso to load under a charterparty dated September 16, 1930, between the agents for the plaintiffs and the Chilean Nitrate Producers Association (Overseas), Ld., as charterers. The cancelling date specified was November 20, 1930. The charterparty contained the usual exceptions including perils of the seas. The policy on freight on which the action was brought was against the usual marine risks and was for 4000*l.*, part of 9000*l.*, on freight and/or chartered freight and/or anticipated freight valued at 9000*l.* subject to reduction after loading to the actual freight at risk as per bills of lading less advances. The policy was subject to the Institute Voyage Clauses—Freight. Of these, the following are particularly material in this case. Clause 4 reads as follows: "In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered." Clause 5: "In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break up value of the vessel or wreck shall be taken into account." Clause 7 reads as follows: "Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." Except in cls. 4 and 5, the words "constructive total loss" do not appear in the policy. The actual value of the ship was 13,000*l.* but the insured value under the policy on ship was 30,000*l.* The ship could only be repaired at a cost exceeding 13,000*l.* but less than 30,000*l.*

By their points of claim the plaintiffs claimed 4000*l.* for a total loss of freight and interest thereon alleging (1.) that the steamer was a constructive total loss and that the freight was therefore totally lost and (2.) further or alternatively that the vessel was unable to proceed on her voyage under the charter-party or to earn any freight and the freight was accordingly lost.

Porter J. said that there was no doubt that the freight was totally lost but the question arose, what was the cause of it? In his view a total loss, or constructive total loss of freight might be due to any of three causes: (1.) total or constructive total loss of ship; (2.) total or constructive total loss of cargo; and (3.) loss of the adventure.

The third of these was a claim consequent on loss of time and was by cl. 7 of the Institute Voyage Clauses—Freight irrecoverable in the present case. The plaintiffs sought however to find a further instance of constructive total loss of freight, maintaining that such a loss arose in a case where a prudent uninsured shipowner would not repair his ship to an extent sufficient to enable him to earn the freight at risk. In support of this argument *Assicurazioni Generali* v. *s.s. Bessie Morris Co.* (1) and *Hansen* v. *Dunn* (2) were relied upon. But those cases did not appear to him to lay down or suggest any such principle. This argument was an attempt to avoid the consequences of cl. 5 of the Institute Voyage Clauses—Freight and to treat the freight policy as if it contained no stipulation that the insured value of the ship should be taken as the repaired value.

The real question here was whether there was a loss of the ship, actual or constructive, such as to prevent the earning of freight. In his view, in a case like the present, there was no total loss of freight by perils of the sea, unless there was a total loss of the ship. There was no such total loss merely because the expenses of repairing the ship so as to enable her to bring

(1) [1892] 2 Q. B. 652.

(2) (1906) 11 Com. Cas. 100.

home the cargo would amount to a sum exceeding the value of the freight, though less than the value of the ship when repaired. There was here no question of actual loss of ship. Was there then a constructive total loss ? This turned on whether the cost of repairs exceeded the value of the ship when repaired but in considering this the value of the ship must by virtue of cl. 5 of the Institute Voyage Clauses—Freight be taken at the insured value of 30,000*l.* His lordship then considered exhaustively the cost of repair and continuing said that it was below 30,000*l.* There was therefore no constructive total loss of the ship on this footing and judgment must therefore be given for the defendants with costs.

The plaintiffs appealed. The appeal was heard on October 25, 28, 29 and 30, and judgment was given on November 15, 1935.

Sir Robert Aske K.C. and *H. U. Willink K.C.* for the appellants. There was here a total loss of freight by perils of the sea because the ship was not repairable save at an expense exceeding her actual value of 13,000*l.* when repaired, so that it was impossible in a commercial sense to repair her and earn the freight. The value of the ship fixed in a case of constructive total loss by cl. 5 of the Institute Voyage Clauses—Freight had nothing to do with the matter. It is a mistake to say that for a total loss of freight there must be a total or constructive total loss of ship : see per Blackburn J. in *Rankin* v. *Potter* (1) and *Assicurazioni Generali* v. *s.s. Bessie Morris Co.* (2) The only question in regard to freight is whether it was possible in a business sense to continue the voyage so as to earn freight. If not, there was a total loss of freight : *Moss* v. *Smith.* (3) The law is fully discussed in Arnould on Marine Insurance (11th ed.) ss. 1104, 1133. Clause 5 of the Institute Voyage Clauses—Freight has reference to cl. 4 which imposes an added risk on the insurers : see *Coker* v. *Bolton* (4) ; and it is only in that particular case that it becomes material to

(1) (1873) L. R. 6 H. L. 83, 117.
(2) [1892] 1 Q. B. 571 ; [1892] 2 Q. B. 652.
(3) 9 C. B. 94.
(4) [1912] 3 K. B. 315.

consider whether there has been a constructive total loss of ship in regard to a freight policy. Clauses 4 and 5 are co-relative and must be read together.

The insurance of freight is merely the insurance of a chose in action and considerations immaterial on the question of the loss of the ship may enter into the question of loss of freight. Thus unless s. 60 of the Marine Insurance Act, 1906, which defines constructive total loss applies to freight, the principles laid down in *Macbeth & Co.* v. *Maritime Insurance Co.* (1) still apply although superseded, as was held in *Hall* v. *Hayman* (2), for the purposes of a claim in respect of constructive total loss of ship.

[They also referred to *Associated Oil Carriers, Ld.* v. *Union Insurance Society* (3); *Wild Rose Steamship Co.* v. *Jupe* (4); *Doyle* v. *Dallas* (5); and Chalmers' Marine Insurance Act, 1906 (4th ed.), p. 83.]

David Davies K.C. and *Charles Stevenson* for the respondents. The plaintiffs can only recover for total loss of freight if they establish that there was a constructive total loss of ship: *Moss* v. *Smith* (6); and see *De Cuadra* v. *Swann.* (7) The same considerations apply to constructive total loss of freight and constructive total loss of ship: see per Collins J. in *Assicurazioni Generali* v. *s.s. Bessie Morris Co.* (8) referring to *Moss* v. *Smith* (6) and *Philpott* v. *Swann.* (9) *Rankin* v. *Potter* (10) assists the respondents although reliance has been placed by the appellants on a dictum of Blackburn J. in that case.

[LORD WRIGHT M.R. This Court will not decide unnecessarily whether a dictum of Blackburn J. is right.]

As there was here no cargo on board, the only section of the Marine Insurance Act, 1906, which can apply is s. 57 which defines actual total loss and it is really immaterial whether that statutory provision applies or the common law.

As to what is meant by cl. 5 of the Institute Voyage Clauses—

(1) [1908] A. C. 144.
(2) [1912] 2 K. B. 5.
(3) [1917] 2 K. B. 184.
(4) (1903) 19 Times L. R. 289.
(5) (1831) 1 Mood. & Rob. 48.
(6) 9 C. B. 94.
(7) (1864) 16 C. B. (N. S.) 772.
(8) [1892] 1 Q. B. 571, 580.
(9) (1861) 11 C. B. (N. S.) 270.
(10) L. R. 6 H. L. 83.

Freight, it is not to be used as applying only when cl. 4 applies. The subject-matter of the two clauses is distinct. The expression " constructive total loss " must have the meaning attributed to the phrases at common law or by statute. It is an expression only used outside marine insurance in the Merchant Shipping Act, 1894, s. 21: see *Manchester Ship Canal Co.* v. *Horlock.* (1) The test for whether there is a constructive total loss of ship is whether the costs of repairing a ship exceed the value of the ship when repaired. That is admittedly the test for a total loss of freight in this case and therefore it is necessary that there should be a constructive total loss of ship for the plaintiff to succeed. It follows that cl. 5 of the Institute Voyage Clauses—Freight applies and the value of the ship must be taken at the insured value of 30,000*l.* There is no reason to connect cls. 4 and 5, apart from their relative positions and cl. 5 is unambiguous in terms and must be applied.

[They also referred to *Farnworth* v. *Hyde* (2) and 3 Kent's Commentaries on American Law, p. 334.]

H. U. Willink K.C. replied.

Cur. adv. vult.

1935. Nov. 15. LORD WRIGHT M.R. [after stating the facts as set out above:] It was clear that the damage was such that in any case the steamer could not be tendered to the charterers by the cancelling date or at any time consistent with the commercial adventure, and, accordingly, it was not questioned that the particular adventure was frustrated by the casualty which, by reason of the inevitable delay consequent upon it, made it impossible to carry out the freight contract. It was, however, conceded by the plaintiffs that to a claim formulated on the ground of that frustration, Clause 7 of the policy was a sufficient answer since the case was governed by the authority of *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (3) But the plaintiffs based their claim on the doctrine that the contract of affreightment

(1) [1914] 2 Ch. 199.

(2) (1866) L. R. 2 C. P. 204.

(3) [1897] A. C. 609.

was discharged between themselves and the charterers by perils of the sea, which had rendered the ship unnavigable and had damaged her to such an extent that she could not be repaired save at an expense exceeding her value (by which was meant her actual value of 13,000*l.*) when repaired; hence for purposes of the adventure she was lost to the owners, because it was impossible in a commercial sense to repair her: they relied on the well-known principles illustrated in *Assicurazioni Generali* v. *s.s. Bessie Morris Co.* (1) (hereafter referred to as the *Bessie Morris* case), and they went on to contend that by the dissolution of the freight contract, on which depended the chartered freight within the meaning of the policy, there was a total loss of freight within the principles expounded in *Moss* v. *Smith.* (2) It is true that no notice of abandonment on the freight policy was given, but it was contended that there was nothing to abandon. The ship had at the date of the casualty no cargo on board; she could not make her cancelling date or be tendered according to contract to the charterers at Valparaiso. No substituted employment was possible; hence there existed all the conditions postulated in *Rankin* v. *Potter* (3) as rendering unnecessary in a case like the present a notice of abandonment on a freight policy. In my judgment there was here an actual total loss of freight. The freight was lost because the charterparty under which it was to be earned was destroyed by the perils of the seas. The learned judge, however, has decided against this claim on the ground that there cannot be a loss of freight (at least on the ground of the cost of repairing sea damage to the ship) unless there is either an actual or a constructive total loss of the ship in such a sense as to bring into operation the terms of cl. 5 of the policy, with the consequence that there could not be in this case a constructive total loss of the ship save on the basis of a repaired value of 30,000*l.*, an actual loss of the ship not being in question.

It will be convenient to examine the legal position so far

(1) [1892] 2 Q. B. 652.
(2) 9 C. B. 94.
(3) L. R. 6 H. L. 83.

as relevant to this case apart from the specific effect of cl. 5 of the freight policy. I shall disregard the numerous and difficult questions which arise in regard to freight insurances under circumstances different from those here in question, as, for instance, where there is at the date of the casualty cargo on board which may be transhipped so that freight can be earned in whole or in part or where a substituted cargo may be procured though the contract cargo is lost. These and other like problems are not relevant in this case. The earning of freight under a charterparty of a specific vessel depends on the continued existence of that vessel as a cargo carrying vessel, at least in a case like the present where no cargo is on board and the vessel is on her way to the port where she should be tendered to the charterers. If, therefore, in such a case the ship is lost or destroyed, the performance of the charterparty and the earning of the freight is prevented: if that is due to perils of the seas the shipowner is relieved from liability in damages to the charterers by the usual exception of perils of the seas in the charterparty. But apart from the loss or destruction of the vessel, the freight may be lost and the shipowner may be relieved as against the charterers if the vessel is so damaged and disabled as to be incapable of being repaired save at an expense exceeding her value when repaired. Such a case is covered by the reasoning in the *Bessie Morris* case (1), though it was held that on the facts of that case the ship could and ought to have been repaired and hence the freight was not lost. Lord Esher in that case said (2): "If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her." Similarly Bowen L.J. said (3): "The ship went aground; but, in order to show that she was prevented from performing the voyage agreed upon by the perils of the sea, she must have become unnavigable for that voyage, either on the ground that it was impossible to get her afloat again, or that, on account of the extraordinary expenditure necessary for that purpose, it would be unreasonable to require the shipowners to incur it." Then Bowen L.J. quotes from the judgment of Maule J. in *Moss* v. *Smith* (1) and from the judgment of Cresswell J. in the same case (2): "When is the shipowner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary; if that were so, any the most inconsiderable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But, if a ship sustains so much sea-damage that she cannot be repaired so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The courts of law have also engrafted this qualification upon the contract—that, if the damage which results from a peril of the sea is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract."

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(1) [1892] 2 Q. B. 652.
(2) Ibid. 657.
(3) Ibid. 659.

Moss v. *Smith* (3) involved an application of these principles to a claim on a freight policy; it was contended there on behalf of the shipowner that there was such commercial prevention as to cause a total loss under a freight policy by insured perils, if the sea damage could not be repaired save at a cost exceeding the value of the freight though less than the value of the ship; that contention was rejected and the same conditions were held to be necessary to justify a claim

(1) 9 C. B. 94, 103. (2) Ibid. 105.
(3) 9 C. B. 94.

on the freight policy as to relieve the shipowner under the charterparty. I need not repeat the passages I have just quoted from the judgments of Maule J. and Cresswell J., as adopted by Lord Esher M.R. and Bowen L.J. The test is the same, under the freight policy and under the charterparty—namely, whether the shipowner has been prevented either in a physical sense or in a business sense from performing the freight contract, so that the freight is lost.

In this way a question has to be solved analogous to that which arises when it is claimed on a hull policy on the ground of cost of repairs that there has been a constructive total loss of ship. But the three contracts, the charterparty, the freight insurance and the hull insurance are completely different; as Lord Chelmsford said in *Rankin* v. *Potter* (1) dealing with the policies: " In the arguments the counsel for the appellant complicated the question by introducing the consideration of the conduct of the plaintiffs with reference to the policy on the ship, as bearing upon their rights under the policy on freight." And he adds later (2) in view of the admission " that the cost of repairing the vessel . . . . would have exceeded the value of the ship when repaired . . . . No prudent man would, in such a state of things, incur the expense of repairing the ship; and the shipowners electing not to repair were entitled to consider the charter at an end, and the chartered freight as totally lost by a peril of the sea."

Porter J., I think, treats these decisions as meaning that in order to constitute a claim for total loss on a freight policy, the ship must be an actual or constructive total loss within the only proper meaning of that term, that is, in insurance law, and under the actual or notional hull policy. Reliance was placed on what was said by Collins J. in the *Bessie Morris* case. (3) " In other words, where the freight is said to be lost through damage to the ship, it must be shown that the ship itself to which the freight is an accessory was actually or constructively lost." But these words are I think explained by what precedes them. Collins J. had said: " It is clear

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(1) L. R. 6 H. L. 83, 154. (2) L. R. 6 H. L. 155.
(3) [1892] 1 Q. B. 571, 580.

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from *Moss* v. *Smith* (1) and *Philpott* v. *Swann* (2) that unless the ship is either irreparable or repair practically impossible, the shipowner cannot show as against his underwriter that he was prevented from earning the freight through damage to the ship, and the standard of what is practically impossible is the same as that of a constructive total loss." It was, it seems, with reference to these observations that in the Court of Appeal in the same case Lord Esher said (3): "The only colour for it"—for the argument addressed on behalf of the appellants—"is to be found in the suggestion that the case is governed by the rules applicable to what is known as 'constructive loss.' But the doctrine of constructive loss can arise only between an underwriter and his assured. There is no underwriter concerned in the present case, and the doctrine of constructive loss has no application to it." It is to be observed that in *Moss* v. *Smith* (1) the term "constructive total loss" does not appear in the judgments. The rule is similarly stated in *De Cuadra* v. *Swann* (4) without these words "constructive total loss" occurring in the judgments, though they do occur in *Philpott* v. *Swann* (5) as being a paraphrase of what Maule J. said in *Moss* v. *Smith* (1), but as I think merely a convenient mode (not strictly correct) of describing the position as between shipowner and charterer. In many cases it would not be necessary to distinguish between the two positions, that is, on the one hand, the position as between shipowner and charterer, upon which depends the claim under the freight policy, and on the other hand the position as between the shipowner and the hull underwriter on the policy on hull. Here it is important, because of cl. 5 of the Institute Voyage Clauses—Freight, to be more precise.

Can it then be truly said that the essential condition for recovery on the freight policy is the constructive total loss of the ship as that term would be used correctly under the hull policy? It is certainly not true that there is a total loss on a freight policy by the constructive total loss of the ship. A

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(1) 9 C. B. 94.
(2) 11 C. B. (N. S.) 270.
(3) [1892] 2 Q. B. 652, 658.
(4) 16 C. B. (N. S.) 772.
(5) 11 C. B. (N. S.) 270, 282.

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ship may be a constructive total loss and duly abandoned to the hull underwriters; if after the property in her has passed to the hull underwriters under the abandonment she earns the freight, the shipowner has no claim for loss of freight (apart from cl. 4 of the Institute Voyage Clauses—Freight); the freight has not been lost at all, though the shipowner does not get it, but that is only because the freight belongs to the hull underwriters as owners of the ship when the freight, which is incident to the property in the ship, is earned. In such a case the freight assured cannot recover from the goods owners who are bound to pay the hull underwriters, nor from the freight underwriters, who are entitled to refuse to pay on their policy because the freight is not lost. This was held by the House of Lords in *Scottish Marine Insurance Co.* v. *Turner*. (1) Conversely, if the ship has been actually lost but the cargo she was carrying at the time of the casualty has been recovered by the shipowners, there may be no loss of freight if it is (for instance) a lump sum freight and some of the cargo is delivered in specie. The same may be true in the case of a constructive total loss of ship if the cargo has been separated from the ship and has remained in the possession of the shipowners before the date at which the property passed to the abandonees of the ship. Again, in such a case as *Jackson* v. *Union Marine Insurance Co.* (2) the freight may be a constructive total loss though the damage to the ship is comparatively slight, for example, a broken shaft, provided only that the delay necessary to effect repairs is such as by frustration of the adventure to dissolve the freight contract and thereby cause a total loss of freight. This would be the case unless the freight policy contained an express clause such as cl. 7 of the Institute Voyage Clauses—Freight. It is not necessary to multiply illustrations of the fact that the freight policy and the hull policy are independent contracts in the absence of a provision in the freight policy, whereby the former is governed by the latter. But it may be observed again that a constructive total loss of ship in a case such as the present is an actual total loss of freight; there is no spes recuperandi; the assured is irretrievably deprived of any possibility of earning the insured freight. What is insured under the freight policy is not a chattel like a ship or a cargo; it is, even in the case of chartered freight, as in the present case, which is the most definite type of insurable interest in freight, merely a chose in action, a right of earning freight under the charter; a fortiori where there is merely an expectancy of earning freight, though enough to constitute an insurable interest.

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(1) (1853) 1 Macq. 334.

(2) (1874) L. R. 10 C. P. 125.

Thus, apart from express terms in the freight policy, the freight underwriter has no concern in the hull policy; it is a separate and independent contract, probably with different underwriters; on the freight policy, the assured may not even be the shipowner. Thus, for instance, chartered freight may be insured by a charterer by demise; the chartered owner may have no general interest in the ship, while the shipowner in such a case has no interest in that chartered freight, though he may have a separate insurable interest in the freight under the head charter. In any case the freight underwriter is not interested in the fate of the ship, except in so far as sea or other perils have so affected the ship as to cause a loss of freight. Whether this is so in fact is a matter which will be exactly the same whether the ship is insured or not; the determination of that question in an issue as between shipowner and charterer will settle whether the freight contract is destroyed by sea or other perils, so that the freight is lost. As between these parties, questions of insurance are irrelevant, as Lord Esher M.R. pointed out in the *Bessie Morris* case (1) in the passage last quoted above. But it follows logically that qua the ship they are, in the absence of special terms, equally irrelevant in this connection between the shipowner and the freight underwriter.

Further, in the absence of special terms, a different test will apply in reference to the freight contract in order to ascertain if the ship is too damaged to be capable of being repaired by the shipowner, the test which will determine whether the ship is a constructive total loss under the hull policy. It is clear that the definition of

(1) [1892] 2 Q. B. 652, 658.

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a constructive total loss of ship in s. 60, sub-s. 2 (i.) of the Marine Insurance Act, 1906, is only dealing with the position under the hull policy: it does not qualify the common law rules according to which it is to be decided if the ship is lost in a commercial sense as between shipowners and charterer as laid down in the *Bessie Morris* case. (1) These common law rules are not affected by the Marine Insurance Act, 1906, which by s. 91, sub-s. 2, says: "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance." It may indeed be that the shipowner in this issue as between himself and the charterer may be entitled to bring in as part of the expense of repairing the ship a sum which represents what the wreck would be worth to him as a wreck if he does not repair. This was the common law rule as laid down by the House of Lords in *Macbeth & Co.* v. *Maritime Insurance Co.* (2) overruling the decision of the Court of Appeal in *Angel* v. *Merchants' Marine Insurance Co.* (3) Sect. 60, sub-s. 2 (ii.), of the Act gave effect to the more technical rules which the Court of Appeal had approved; and therefore superseded (as it was held in *Hall* v. *Hayman* (4)) for purposes of a constructive total loss claim on the ship the more elastic rules adopted in *Macbeth's* case (2); but as the section only applies to an insurance on hull, it would seem that the rules laid down by the House of Lords in *Macbeth's* case (2) would still apply in a question between shipowner and charterer in which the test is still what course the prudent uninsured owner would adopt; as already explained, the question between freight underwriter and shipowner must follow the same lines in the absence of special terms as those between shipowner and charterer in the matter now in question. There is then a further objection to assimilating the claim for loss of freight to the claim for a constructive total loss of hull. It is well known that the Act did not deal expressly with the subject of freight insurance except in s. 16, sub-s. 2,

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(1) [1892] 2 Q. B. 652.
(2) [1908] A. C. 144.
(3) [1903] 1 K. B. 811.
(4) [1912] 2 K. B. 5.

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where it defined the insurable value of an interest in freight as the gross amount of the freight at the risk of the assured plus the charge of insurance, and in s. 70, where it gave the rules for adjusting a partial loss on freight. It may indeed be that part of the definition of actual total loss in s. 57, sub-s. 1, that is, the words " where the assured is irretrievably deprived " of the subject-matter insured, may apply to an actual total loss of freight such as the present; similarly the relevant words of s. 60, sub-s. 1, may apply to a constructive total loss of freight in a case like *Jackson* v. *Union Marine Insurance Co.* (1), or a case where cargo is on board which might be transhipped. But I do not think that section can apply to a case like the present which in my judgment is an actual total loss of freight.

The reasoning by which the learned judge meets these contentions is, as I understand, that since he holds that the assured have to prove a constructive total loss of ship in order to recover, cl. 5 of the Institute Voyage Clauses—Freight is brought into operation, with the result that the repaired value is deemed for purposes of the freight policy to be not 13,000*l.*, the actual value, but 30,000*l.*, the insured value under the hull policy. Whether that is so must depend on whether cl. 5 applies. In substance the learned judge treats the freight policy as if it provided expressly or by implication or by intendment of law that a total loss of freight should only be recoverable in the event of an actual or constructive total loss of ship under the hull policies. An express clause to this effect is not uncommon in freight policies. A policy on the chartered freight on the very voyage in question was produced, with the terms: " To pay only in the event of the total and/or constructive and/or arranged total loss of steamer." I merely refer to this as an illustration of a common clause. But there is certainly no such clause in this policy. For reasons already explained, I do not think that apart from express terms the right to claim a total or constructive total loss under this policy can depend upon whether there is a constructive total loss under the hull policies. Certainly

(1) L. R. 10 C. P. 125.

cl. 5 contains no such condition. Clause 5 by its terms can only apply when it is the constructive total loss of the ship that is an essential condition of recovery under the freight policy. The first part of cl. 4 deals with the case referred to above where the shipowner, but for the clause, would lose his freight on the ground that it has been earned by the ship after it had been abandoned to underwriters, and the clause in such an event gives an added right of recovery of the full freight. Its effect was explained in this sense by Hamilton J. in *Coker* v. *Bolton.* (1) But there is no other condition of the freight policy which postulates or refers to a constructive total loss of the ship; the term is nowhere else than in clauses 4 and 5 used in the policy. Clause 5 gives no added right and imposes no new condition save when it is necessary to establish a constructive total loss of the ship. The clause if more correctly expressed would read: "Whenever it is necessary to prove the total loss, actual or constructive of the ship," etc. But that can only apply where the contract of insurance requires the ascertainment of that fact as a condition of recovering. Clause 5 does not import any such condition.

The answer made by the defendants' counsel to that proposition was that if it is decided that by the general law an actual or constructive total loss of the vessel in the technical insurance sense is not an essential condition to the recovery of a total loss under the freight policy, still in ordinary commercial parlance the state of irreparability of the ship which is discussed in the *Bessie Morris* case (2) is spoken of as a constructive total loss because it is a total loss in a commercial, and not physical, sense. But I cannot accept that view of the position. I do not know if such ideas or language are common among business men, but in any case the two legal concepts appear to me for reasons already explained to be essentially different. I do not indeed think that cl. 5 is necessarily limited to a constructive total loss for purposes of cl. 4. I think it might apply to any term in the policy which refers, as cl. 4 does, to a constructive total loss

(1) [1912] 3 K. B. 315.

(2) [1892] 2 Q. B. 652.

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of the ship under the hull policy. Such a policy must, if the clause is to apply, contain an insured value. The clause is, therefore, inapplicable to a notional constructive total loss of ship under a notional hull policy such as is illustrated by the case of *Roura & Forgas* v. *Townend.* (1) As cl. 4 can only become effective if applied to a case of abandonment of the ship to hull underwriters under a hull policy containing the insured value clause, the expression "constructive total loss" must there be used in its technical and correct sense. The defendants here seek to construe the same expression in cl. 5 as not only applicable, as it properly is, to such a case, but also as equally applicable to what in my opinion is the entirely different case, which is in question here, where the question is primarily as between the shipowner and the charterers, and only as a consequential issue between the shipowner and freight underwriters. I do not think the same words can properly be construed as having so widely different meanings in the same clause.

In the result I do not think that cl. 5 can be applied to the facts of this case, because I do not think the freight policy required that there should be a constructive total loss of the ship within the true meaning of that phrase in cl. 5 of the freight policy. But it might be a sufficient answer to the defendants' contention to say that the decision of the learned judge involves a serious limitation of the shipowners' rights under the policy: though they lose the benefit of their freight contract vis-à-vis the charterers and hence the freight, because their ship is so damaged that she cannot be repaired (as I assume here to be the case) except at a cost exceeding her repaired value of 13,000*l.* they cannot, according to the judge's decision, recover on the freight policy because they cannot prove that the ship could not be repaired at a cost less than 30,000*l.* I think much clearer words are necessary to achieve the consequence that the assured is to be so limited in his rights under the policy and the basis of his right to recover for a total loss of freight is to be radically changed. On that ground alone I should with all deference

(1) [1919] 1 K. B. 189.

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feel bound to come to a conclusion different from that of the learned judge.

For these reasons I think the appeal should be allowed, the judgment of the Court below should be set aside and it should be declared that the plaintiffs are entitled to succeed in the claim for a total loss of freight on the basis that the value of the ship for purposes of comparison with the cost of repairs is the actual value and no more. The judge has made no specific finding on that issue, but the facts that he has found seem to leave little doubt that the plaintiffs must succeed on that basis. If the defendants so desire the case will be remitted to the judge for his finding on that basis for him to determine the precise amount recoverable. If the defendants do not so desire, judgment will be entered for the plaintiffs on the claim.

SLESSER L.J. I have read the judgment of the Master of the Rolls in this case, with which I agree, and I have little to add thereto.

The critical question which arises in this case is whether the value of the ship should be taken to be 30,000*l.*, or a far less sum—namely, 13,000*l.*, it is said. The former is the value stated to be the insured value in the policy on ship and the latter to be the actual value as found by the learned judge before the casualty. If the insured value of 30,000*l.* be properly taken, the ship when repaired would be worth the sum which it is necessary to spend on her; if on the other hand the value of the ship is the less sum, it may be, in the language of Maule J. in *Moss* v. *Smith* (1) that the ship would have sustained " Such extensive damage, that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay," and the freight would be lost by perils of the sea and so the freight insurers would be liable.

The ground upon which it could be said that the value of the ship was 30,000*l.*, can only be supported by invoking

(1) 9 C. B. 94, 103.

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cl. 5 of the freight policy which provides that: "In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

The learned judge has come to the conclusion that it is necessary for the plaintiffs in this case, in order that they may recover, to show that the ship is a constructive total loss and he therefore comes to the conclusion that such a finding being necessary, cl. 5, which I have quoted, must apply when the test whether the reparation is or is not commercially feasible is considered and 30,000*l.*, the insured value in the policy on ship, be taken as the basis of that inquiry.

While it may be true to say, subject to qualifications which I mention hereafter, that the test in fact to be applied in the case of loss of freight may be substantially the same as that to be applied in ascertaining whether there is a total constructive loss of the ship—namely, that laid down in *Moss* v. *Smith* (1), and now in s. 60, sub-s. 2, of the Marine Insurance Act, 1906, to the effect that there is "a constructive total loss— . . . . (ii.) in the case of damage to a ship, where she is so damaged by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired," yet it is not right to say, because the facts which have to be considered may be to some extent similar, and similar conclusions on like facts may be arrived at, that constructive total loss of the ship, as such, has to be proved in the case of a claim for loss of freight. The words "constructive total loss of the ship" in cl. 5 of the freight policy are words of art and cannot properly be employed in the case where the question for determination is whether the freight has been lost by perils of the sea. It is this assumption that it is necessary actually to prove constructive total loss of the ship in order to recover upon a claim for loss of freight by perils of the sea which in my opinion invalidates the judgment against which this appeal lies: if there be wreck-value to be taken into account it is not even accurate to say that the same facts will support a finding of loss of freight by perils of the sea and a finding of constructive total loss of the vessel by the same perils, or that the standards are comparable for the following reason.

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(1) 9 C. B. 94.

In *Macbeth & Co.* v. *Maritime Insurance Co.* (1), it was held before the passing of the Marine Insurance Act, 1906, s. 60, that in estimating the value of a ship as worth repairing the value of the damaged ship as a wreck was taken into account. Now, by that section, the value of the wreck cannot any longer be added by the assured to the cost of repairs (*Hall* v. *Hayman* (2)), but in so far as s. 60 is not dealing, in my view, with loss of freight in such a case as this, in considering the problem whether loss of freight is due to perils of the sea, the value of the wreck in applying the test of whether a prudent insured owner would sell the ship where she lies or repair her may still be relevant (see s. 91, sub-s. 2, of the Act preserving the common law when not disturbed) so that the criteria in any given case of disputed causation by perils of the sea in the case of constructive total loss of ship and loss of freight may in certain cases differ.

There remains for consideration the question for what purpose it was necessary to insert a provision determining the basis of ascertainment of constructive total loss in cl. 5 of the freight policy. To understand this it is first necessary to quote cl. 4 of the same policy, which is to the effect that: "In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered."

In *Coker* v. *Bolton* (3) it was held that what is here cl. 4 prevented the operation of the ordinary rule of law by which, in the event of a constructive total loss, the right to the freight earned subsequently to the loss passes to the underwriters on hull and for such a purpose it may have been considered necessary to consider a matter not generally

(1) [1908] A. C. 144. (2) [1912] 2 K. B. 5.
(3) [1912] 3 K. B. 315.

material in the case of a claim to loss under the freight policy —namely, what constitutes constructive total loss of the ship, and the contracting parties have thought fit for such a purpose to fix as the ship's value the insured value of the ship in the hull policy. It is to be noted that such a clause is in favour of the assured; here clauses 4 and 5 read together are sought to be used to his detriment.

I am not prepared to say that the operation of cl. 5 is necessarily limited to cases coming under cl. 4, and whenever the question, has there been a total constructive loss of the ship, is raised on the freight policy, cl. 5 may well operate, though I find it difficult to imagine such a case under this contract. But for the reasons I have stated that question should not have been propounded in that form in the present case, and there is no reason, therefore, for invoking cl. 5, which produces an artificial enhancement of the value of the ship.

It is true that in the books there are certain dicta which seem to support the view of the learned judge in this case, that " there can be no total loss of freight unless there be a total or constructive total loss of the ship," such as the words of Collins J. in the *Bessie Morris* case (1) to the effect that: " Where the freight is said to be lost through damage to the ship, it must be shown that the ship itself to which the freight is an accessory was actually or constructively lost." But these and similar statements really mean no more than that the standard to be applied in the case of freight is that which would be appropriate to the case of constructive total loss if the claim were upon a hull policy, though for reasons which I have stated, since the passing of the Marine Insurance Act, 1906, even this may not now be entirely accurate. The test whether the expense is one which a prudent uninsured owner would incur may or may not be precisely the same in the case of a claim on freight or on hull policy. But to say simpliciter that it is necessary to prove on a freight policy that the vessel is a constructive total loss is, to my mind, not correct.

As I have said, on the actual value of 13,000*l*., there can be no question but that this freight was lost by perils of the

(1) [1892] 1 Q. B. 580.

sea, and I agree, therefore, that the assured succeeds and that this appeal should be allowed and the case remitted on the terms stated by my Lord.

GREENE L.J. I agree.

There are three contracts to be considered in this case and it is important to keep them distinct. They are (1.) the charterparty, (2.) the hull policy, (3.) the freight policy.

(1.) The charterparty regulates the rights and obligations of the shipowners and the charterers. It contains the usual exception of perils of the sea the effect of which is to excuse the parties from performing the contract if performance is prevented by a peril of the sea. The rights and obligations of the parties under the charterparty are not affected by the existence or the terms of either the hull policy or the freight policy. In considering those rights and obligations it is in my opinion important to avoid the introduction of the expression "constructive total loss." This is a technical expression relating to the rights and liabilities of assured and underwriters under marine policies and is not proper to be employed in dealing with the position as between owner and charterer under a charterparty. So far as regards owner and charterer the relevant question in the present case is, What is the state of facts arising from a peril of the sea which will entitle the shipowner or the charterer to treat the contract as discharged? Where such a state of facts exists and either party properly elects not to proceed with the contract the contract is discharged and the shipowner loses his right to receive the unpaid freight.

A lengthy discussion took place before us as to what state of facts arising from a peril of the sea would justify a determination of the charterparty. It was said on behalf of the respondents that apart from actual total loss of the vessel there must be a constructive total loss of the vessel. As I have already pointed out, constructive total loss is a conception with which, as such, the charterparty has nothing to do. The misleading nature of the proposition appears in a striking manner when the question what is meant by constructive total loss as therein used is investigated. If it means constructive total loss in the sense prescribed by s. 60 of the Marine Insurance Act, 1906, the result will be that the rights and liabilities of the parties under the charterparty are governed in this respect by a statute which is concerned only with marine insurance; and it would appear to follow that they would be affected by any amendment of that section which altered the statutory definition of constructive total loss. It is to be observed that the section itself altered the law as to what is necessary to constitute constructive total loss as laid down by the House of Lords in *Macbeth & Co.* v. *Maritime Insurance Co.* (1) I am unable to accept the view that the facts necessary to discharge the contract contained in the charterparty can in any way be affected by the statutory provisions from time to time in force with regard to constructive total loss.

If on the other hand the expression means "constructive total loss" as it was before the statute under the decision in *Macbeth's case* (1) the argument fails to secure that correspondence between the position under the charterparty and the position under the hull policy which it aims at establishing.

In truth as I have already said the proposition is a misleading one. The question what facts will constitute constructive total loss under a hull policy where the vessel is damaged by a peril of the sea appears to me to be fundamentally different from the question what facts will discharge the contract contained in the charterparty when the vessel has been damaged by a peril of the sea. In each case the amount of expenditure required to repair the vessel (if she is repairable) is a vital consideration; and ignoring for the moment the complication introduced by the Marine Insurance Act above referred to, it may be that no damage will discharge the contract contained in the charterparty which would not be sufficient to constitute a case of constructive total loss under an actual or imaginary policy on hull; any conventional value agreed upon in a hull policy being for this purpose of course ignored. For the purposes

(1) [1908] A. C. 144.

of my judgment in this case I am prepared to proceed upon this hypothesis, although it must not be assumed that I accept it as correct or that I accept the view that the amount of damage requisite to discharge the contract contained in the charterparty is in any way affected by statutory provisions for the time being in force in relation to what constitutes constructive total loss for the purposes of a policy on hull. I must also make it clear that the acceptance of this hypothesis is a different thing to the acceptance of the proposition that "constructive total loss" is a proper way of describing the state of the vessel when the question is one between owner and charterer or between assured and underwriter on freight. The importance of this distinction for the present case will appear when I come to consider the Institute Clauses which are incorporated in the freight policy.

It was said on behalf of the appellants that the true test is in principle that performance of the charterparty is excused if the expenditure necessary to make the vessel navigable *for the voyage in question* is such that it would be unreasonable to require the shipowner to incur it. The effect of this contention if correct would be to introduce a standard of damage different from that required to constitute a constructive total loss under a policy on hull and accordingly to make it impossible to say that cl. 5 of the Institute Clauses applied. For the purposes of this judgment it is unnecessary to consider whether or not this contention is correct.

(2.) The position of the parties under the hull policy presents no difficulties. It only comes into consideration in this case for the purpose of seeing to what extent its existence or its terms may affect the mutual rights and liabilities under the freight policy.

(3.) By the freight policy the shipowner effected an insurance of the freight payable under the charterparty against the risk of loss by perils of the sea. The subject matter of the insurance is a chose in action—viz., the contractual right to receive the freight from the charterer under the charterparty. If that right is lost through a peril of the sea the underwriters are liable as on a total loss.

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In considering whether or not there has been such a loss of the right to receive freight through a peril of the sea it is necessary to determine in the first place whether or not as between charterer and shipowner the right to receive the freight has been lost by peril of the sea. Upon principle and apart from any special provisions in a freight policy (such as, e.g., cl. 7 in the Institute Clauses), this would in my opinion be the relevant question to determine in deciding what are the liabilities of the freight underwriter, and in deciding this question the same principles must apply as between assured and underwriter on freight as apply as between owner and charterer.

The question was discussed before us as to the state of facts necessary to enable the assured on a freight policy, apart from special provisions, to recover where the ship is damaged. This question is similar to that discussed in the case of charterer and owner and similar contentions were made on behalf of the parties. Here again, I do not find it necessary to decide whether or not the appellants' contention is correct and in particular I refrain from expressing any opinion as to the correctness or otherwise of certain observations of Blackburn J. when advising the House of Lords in *Rankin* v. *Potter* (1) which were discussed at length before us. I am content without deciding the question, for the purpose of this judgment to accept in the case of the freight policy a hypothesis corresponding to that which I have for the like purpose accepted in the case of the charterparty.

Apart from certain special clauses in the freight policy it could not have been contended that the right of the assured in the circumstances to recover from the freight underwriters would have been affected in any way by the valuation clause in the hull policy, the effect of which on the facts of the present case was to prevent the case being one of constructive total loss as between the owners and the hull underwriters. Apart from the special clauses in the freight policy the existence and the terms of the hull policy

(1) L. R. 6 H. L. 83, 117.

appear to me to be irrelevant for the purpose of determining the rights and liabilities of the parties under the freight policy. The fact that the parties to the hull policy have for the purposes of that policy agreed on a conventional value for the vessel cannot in the absence of special provision to that effect in the freight policy prevent the assured under the freight policy from asserting that he has lost the right to receive the freight from the charterer by a peril of the sea.

Upon the hypothesis referred to above the decision of the present case in my opinion turns entirely on the true effect of clauses 4 and 5 of the Institute Voyage Clauses—Freight, which are incorporated in the freight policy. The terms of these clauses have already been stated and I need not repeat them. A clause similar to cl. 4 has already been judicially considered by Lord Sumner (Hamilton J. as he then was) in *Coker* v. *Bolton.* (1) The form of Institute Freight Clauses which fell for consideration in that case did not, as we were informed by counsel, contain a clause corresponding to what is now cl. 5, that clause having been introduced into the form at a later date. Lord Sumner held that what is now cl. 4 was introduced to meet the hardship caused by the rule that a shipowner who by giving notice of abandonment has lost his right to any freight subsequently earned is precluded from suing on the policy on freight. I do not read this judgment as meaning that this is necessarily the only effect of the clause, indeed the words " whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered," seem to show that it has a wider operation. The object of the clause, however, was I think clearly to confer additional rights upon the assured, not to cut down rights which he already enjoyed.

I turn now to a consideration of cl. 5. One argument advanced on behalf of the respondents with regard to this clause may be stated as follows :—in order to entitle the assured to recover on the freight policy there must be a constructive total loss of the vessel : apart from cl. 5 it might be doubtful whether the real value of the vessel or its

(1) [1912] 3 K. B. 315.

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conventional value as stated in the hull policy should be taken for this purpose ; cl. 5 removes this doubt by providing that the conventional value is to be taken and as on the basis of that value there was no constructive total loss of the vessel the assured is not entitled to recover.

On the other hand it is said on behalf of the appellants that cl. 5 is merely a definition of the expression "constructive total loss" in cl. 4, an expression which does not appear elsewhere in the freight policy.

It is right to observe that if the sole object of cl. 4 was to afford a remedy for the injustice referred to by Lord Sumner, cl. 5 would appear to be in part at any rate otiose since that injustice could not arise unless there had in fact been abandonment of the vessel to the underwriters and abandonment as on a constructive total loss could only take place in accordance with the terms of the hull policy and on the basis of the conventional value appearing therein.

But this does not dispose of the matter. The argument is necessarily based upon the assumption that constructive total loss of the vessel is as such essential to the right of the assured to recover under the freight policy since it is only upon this assumption that the formula laid down in cl. 5 for ascertaining when a constructive total loss has taken place is relevant. If I am right in my view that this assumption is incorrect the whole argument appears to me to fall to the ground. The formula can, in my opinion, only be applied where constructive total loss as such is relevant for the purposes of the freight policy and it can only become relevant if the parties have so agreed. The only matter in respect of which the parties have expressly so agreed are the matters dealt with in cl. 4 and I think that the operation of cl. 5 must in this policy be confined to those matters, although a similar clause in a different policy might have a wider effect, e.g., if the policy itself contained other references to constructive total loss of the vessel. The other argument as to the operation of cl. 5 was as follows :—

It was said that even if the phrase "constructive total loss" of the vessel is not in itself apt to be used in reference to the question between assured and underwriter on freight yet the parties must be taken so to have used it in the present case; and in support of this argument it was said that what would be in strictness a misuse of a technical expression is intelligible if the relevant state of facts with regard to the condition of the vessel is the same both for the purpose of constituting a constructive total loss under a hull policy and for that of constituting a loss of freight by a peril of the sea under the freight policy. But I do not think that this argument should be accepted. The effect of accepting it would be to cut down the rights of the assured under the freight policy to a serious extent. If the parties had this object in mind it would have been natural to use clear language and in my opinion the language of cl. 5 has no such clear meaning. If the argument were accepted it would mean that the parties had in the first place tacitly assumed that the requisite state of facts with regard to the condition of the vessel was the same under the freight policy as under the hull policy—an assumption which leaves at large the question whether constructive total loss at common law or under the Marine Insurance Act, 1906, is meant—and had then inaccurately used in cl. 5 the expression "constructive total loss" to describe that state of facts.

If it had not been for the fact that we are differing from Porter J., I should have been content to express my agreement with the judgments already delivered, but out of respect for the learned judge I have thought it right to state my reasons, which I do with all deference.

Appeal allowed.

Solicitors: *Holman, Fenwick & Willan; William A. Crump & Son.*

H. C. G.

1935
Oct. 29.

STEVENSON *v.* FULTON.

Criminal law—Accommodation address—Member of the public making use of—Giving false information—Offence—" Any person "—Official Secrets Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 75), *s.* 5, *sub-s.* 4.

The respondent was summoned for giving false information to the keeper of an accommodation address registered for the receipt of letters, contrary to s. 5, sub-s. 4, of the Official Secrets Act, 1920. The magistrate dismissed the summons on the ground that s. 5 applied only to offences committed by keepers of accommodation addresses as distinct from persons using them, and that the respondent could not be convicted under that section :—

Held, that the words of s. 5, sub-s. 4, were wide enough, and precise enough, to include also offences committed by users of accommodation addresses, and that the respondent ought to have been convicted.

CASE stated by a Metropolitan magistrate.

The appellant, Leonard Stevenson, a police officer, preferred an information against the respondent, Albert Raymond Clarence Fulton, for that he did on July 5, 1934, give false information to the keeper of an accommodation address registered for the receipt of letters, contrary to s. 5, sub-s. 4, of the Official Secrets Act, 1920. (1)

On July 5, 1934, the respondent called at a registered accommodation address at 37 St. Martin's Court, W.C., and asked that letters might be there received on his behalf.

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(1) The Official Secrets Act, 1920, provides as follows :—

Sect. 5 (under the marginal note " Registration and regulation of persons carrying on the business of receiving postal packets ") :

Sub-s. 1 : " Every person who carries on . . . . the business of receiving for reward letters, telegrams, or other postal packets for delivery or forwarding to the persons for whom they are intended, shall as soon as may be send to the chief officer of police for the district, for registration by him, notice of the fact together with the address or addresses where the business is carried on, and the chief officer of police shall keep a register of the names and addresses of such persons, ... "

Sub-s. 2 : " Every person who carries on such a business as aforesaid shall cause to be entered in a book kept for the purpose the following particulars—(*a*) the name and address of every person for whom any postal packet is received, or who has requested that postal packets received may be delivered or forwarded to him . . . . and shall not deliver a

On being asked to write his name and address in the register he wrote " Norman Blake, 46, Windermere Road, Southall." There was no such number as 46 Windermere Road, Southall. On two later dates the respondent called at another agency in Charing Cross Road, where he filled in forms for the insertion of advertisements in newspapers, giving different false names and addresses in each case. Those advertisements were inserted and many replies thereto were received. On November 22, 1934, the appellant saw the respondent leaving 37 St. Martin's Court, and asked him where he was living. The respondent then gave his true address in Maida Vale.

The question at issue was whether s. 5, sub-s. 4, of the Official Secrets Act, 1920, applied only to the keepers of accommodation addresses or extended to every person giving false information to such keepers.

For the appellant it was contended that the words of the sub-section were wide enough to include any person giving false information to the keeper of such a business. On behalf of the respondent the magistrate's attention was drawn to the terms of the marginal note to s. 5 and to the fact that sub-ss. 1, 2 and 3 dealt exclusively with the duties of persons carrying on the business of receiving postal packets, and of chief officers of police, and in no way regulated the conduct of persons who made use of any such business by having

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letter to any person until that person has signed a receipt for the same in such book as aforesaid, ..."

Sub-s. 3: " The books so kept and all postal packets received by a person carrying on any such business, and any instruction as to the delivery or forwarding of postal packets received by any such person, shall be kept at all reasonable times open to inspection by any police constable."

Sub-s. 4: " If any person contravenes or fails to comply with any of the provisions of this section, or furnishes any false information or makes any false entry, he shall be guilty of an offence under this Act. . . . ."

Sect. 7: " Any person who attempts to commit any offence under the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under the principal Act or this Act, shall . . . . be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence."

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their correspondence addressed thereto. It was contended that the marginal note referred to the whole of s. 5, and that having regard to that, and to the wording of sub-ss. 1, 2, and 3, it followed that sub-s. 4 could only apply to persons carrying on any such business.

The magistrate stated that he could find no authority deciding the question, but was informed that magisterial decisions which had been given were contradictory. He observed that the duties laid down by s. 5, sub-ss. 1 and 2, were limited to what were known as accommodation address keepers, whereas by s. 5, sub-s. 4, which was the penal sub-section, the words "any person" were employed, but he was of opinion that, in spite of those words of universal application, the penalty should not be imposed on the defendant. He considered that the opening words of s. 5, sub-s. 4, "fails to comply with any of the provisions of this section," were inappropriate to the imposition of a penalty except on one of the class specified in s. 5, sub-ss. 1 and 2, and that the succeeding words in s. 5, sub-s. 4, "furnishes any false information or makes any false entry," being unaccompanied with any limitation as to the persons by whom the information should be given, and about what, were not sufficiently precise to justify the imposition of a penalty on any member of the public under an Act of Parliament which appeared only to contemplate offences committed by a particular class. He accordingly dismissed the information.

Mervyn Griffith-Jones (*Christmas Humphreys* with him) for the appellant. There is a clear distinction between the words "any such person" in sub-s. 3, and "any person" in sub-s. 4. The construction upheld by the magistrate would render the section entirely valueless for the purpose for which it was intended, since any person could give false information about himself, which the keeper of the accommodation address would pass on in good faith to the police. It is submitted that the keeper would not be liable for giving false information unless he knew, or ought to have known, it to be false, and therefore the responsibility must have been intended to be thrown on the person giving the false information about himself. The marginal note is no part of the Act, and cannot limit the general words of the section.

L. A. Byrne for the respondent. The consequences suggested by the appellant do not necessarily follow from the magistrate's construction. It is not suggested that the respondent has committed no offence, but that he is charged with the wrong offence, or under the wrong section. Had he been charged under this sub-section with making a false entry or under s. 7 with "soliciting or inciting or endeavouring to persuade" the keeper of an accommodation address "to commit an offence," or with aiding and abetting, it is possible that he might have been in difficulties. But s. 5 throughout has dealt with the duties of keepers of accommodation addresses. The marginal note (though admittedly not part of the Act) is an indication of what was intended to be the subject-matter of the section, and the construction sought by the appellant is wider than is reasonably necessary to make sub-s. 4 (which is a penal section) effective.

LORD HEWART C.J. This is a case stated by one of the magistrates of the police courts of the Metropolis and it raises a somewhat interesting point.

The question is whether the words in s. 5, sub-s. 4, of the Official Secrets Act, 1920: "or furnishes any false information"—that is to say, with reference to the matter there being dealt with—are wide enough to cover the act of a person who in order to make use of what is called an accommodation address gives to the person carrying on the business of receiving postal packets false information as to his actual name and address.

In this case the respondent on various occasions gave false names and addresses to be registered, concealing his own identity, in order that he might afterwards collect letters or postal packets. It is said by the magistrate that in his opinion to bring such a person within the net of "furnishing any false information" within the meaning of sub-s. 4 of s. 5

would be to give an unduly wide interpretation to that sub-section. He was of the opinion that the Act of Parliament contemplated offences committed only by a particular class—that is to say, by the keepers as distinguished from the mere users of accommodation addresses.

With all due respect to the magistrate, I cannot help thinking that he has taken too narrow a view. He seems to have been misled to some extent by the words of the marginal note: "Registration and regulation of persons carrying on the business of receiving postal packets." That marginal note is no more than a label; it shows the subject-matter that is being dealt with in the section.

But if one looks at the scheme of the section I think it is tolerably plain that the magistrate came to a wrong conclusion. Sub-s. 1 of the section begins with the expression: "Every person who carries on . . . . the business," etc., etc. Sub-s. 2 begins with the expression: "Every person who carries on such a business as aforesaid."

In the course of those two sub-sections and in the words that follow other persons are mentioned, and in particular "every person for whom any postal packet is received, or who has requested that postal packets received may be delivered or forwarded to him." It is after the section has used those expressions that sub-s. 4 provides (inter alia) that if any person furnishes false information he shall be guilty of an offence—not any person who carries on such a business, but any person who furnishes false information—that is to say, with reference to the matters herein treated.

I think that the view which the magistrate has so well expressed fails to give sufficient effect to what seems to me to be the clear antithesis between the expression "every person who carries on such a business" and the expression "any person," especially as those words "any person" follow an enumeration of persons including others than the person carrying on the business.

It is argued by Mr. Byrne that if the magistrate's view is correct it does not follow that a person who by falsehood is able to conceal his identity when he is seeking the

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accommodation here being described would go scot-free. It is said that by a proper interpretation of at least one other section in this Act he might be hit. I am not sure of that and I decide nothing about it; least of all is it necessary to decide whether a person who carries on the business of receiving postal packets and makes a false entry in his book must, if he is to be guilty of an offence, make it with knowledge of falsity. It may be that some day that question will have to be considered, but I do not think it arises to-day. It seems to me that upon the plain words of this sub-section, accentuated by contrast with other words referring to persons appearing in the other sub-sections of this section, this man does come within the mischief which is covered by the Act. He furnished false information of the most vital and fundamental character, because all the inquiries which this section is intended to facilitate would be rendered nugatory if, although a proper register in form were kept, the register consisted in fact not of true names and addresses but of names and addresses deliberately falsified.

With all due respect to the magistrate, who has evidently considered this matter with great care, I think his conclusion on the point of law was wrong and that these words are wide enough, and at the same time precise enough, in this context to cover the offence which was charged on these facts. I think therefore this appeal ought to be allowed and the case go back to the magistrate with a direction that the offence which was charged was proved.

I have deliberately refrained from entering into some other matters which are of interest but which do not appear to me to be necessary to the decision of this case.

HUMPHREYS J. I also think that the learned magistrate was wrong in the view which he took of the words "furnishes false information" in sub-s. 4 of s. 5 of the Official Secrets Act, 1920, and for the reason advanced by Mr. Griffith-Jones; that is, that there is no good reason why those plain words

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should not be given their plain meaning in the construction of them when they are found in this sub-section.

Mr. Byrne says: "I admit that if the result of my argument is that the Legislature has not provided any penalty at all for the person who is the fons et origo of the trouble created by the giving and recording of false particulars in regard to the keepers of accommodation addresses and the persons who use them, my argument must fail." But, he says: "The Legislature must be taken not to have intended in using the words 'any person who furnishes any false information' to deal with any one else except the keeper of an accommodation address, because they have dealt elsewhere with the person who gives false information to the keeper of an accommodation address and thereby caused something to be done which will eventually result in false information being given to a police officer who has the right to inspect these books under sub-s. 3 of s. 5."

His argument amounts to this, that that person who gives false information about himself, a false name and address, makes a false entry in the book. He says he makes a false entry because he intentionally causes a false entry to be made. And those are the appropriate words, says Mr. Byrne, which deal with the person who gives false information. I confess it seems to me to be a very elaborate method of dealing with the person who clearly and ex concessis must have been intended to be dealt with by Parliament—namely, the person who gives the false information. But whether it is or is not possible—I respectfully agree with my Lord it is not necessary to decide it in this case—to deal in some other way with a person who gives false information to a keeper of an accommodation address, I myself cannot think that that is a good reason for attributing any other than their ordinary meaning to these perfectly simple words.

In my view, the plain meaning of s. 5 is this, that in sub-s. 1 there is required of the person who keeps the accommodation address particulars of himself and his business, and in sub-ss. 2 and 3 there is required of such a person particulars to be entered as to the persons who use his business premises.

In sub-s. 4, which is the only part of this section dealing with penalty, I think in quite appropriate language each of those persons is dealt with. While it is quite true that the first words: "If any person contravenes or fails to comply with any of the provisions of this section" deal only with a person who carries on the business, in my view the next words, any person who "furnishes any false information" are intended to and certainly are wide enough to bring into the ambit of the sub-section the person who does that which the respondent in this case admittedly did, that is, gives false information in regard to the matters dealt with by this section.

For those reasons I agree with the judgment of my Lord and think that this case ought to go back to the learned magistrate with the intimation that he has taken a wrong view of the law, and that on the facts stated by him the respondent should have been found to have committed the offence which was charged against him.

SINGLETON J. I agree that on the facts as stated the offence charged under s. 5, sub-s. 4, of the Official Secrets Act, 1920, was committed.

Solicitors for the appellant: *Wontner & Sons.*

Solicitors for the respondent: *Freke Palmer, Romain & Romain.*

J. W. H.

1935
Nov. 5, 6.

NORTH AND SOUTH INSURANCE CORPORATION, LIMITED *v.* NATIONAL PROVINCIAL BANK, LIMITED.

Banker—Mandate—Document in form of cheque—Partly printed and partly in writing—Inconsistency between printed and written words—Construction—" Pay cash or order "—Direction to banker—Payment by banker in accordance with direction and intention of drawers—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 2, 3, 7, 73.

The directors of the plaintiff company, being desirous of paying 250*l.* to the L. & W. Corporation for services rendered, drew a document in the form of a cheque for that amount on their account with the defendant bank and delivered the document to B., a director of the L. & W. Corporation. The document was partly printed and partly in writing. The printed form was suitable for being filled in to make a cheque payable to order. It contained the blank space for the name of the payee to be filled in, followed by the printed words " or order." The document was made out in the form " Pay cash or order," the word " cash " being in writing. The document was not crossed and was never endorsed. It was paid into B.'s banking account and presented to the defendant bank in the ordinary way of bank accounting and was duly paid. In the result, the sum of 250*l.* passed from the account of the plaintiff company with the defendant bank to the L. & W. Corporation, and the defendant bank debited the plaintiff company's account with that sum and interest. Subsequently, a compulsory winding up order was made against the plaintiff company on the petition of the Board of Trade, presented a few days before the above transactions took place. The liquidator of the plaintiff company contended that the document was a cheque payable to order and required endorsement and that as it had not been endorsed, the defendant bank had no authority to pay the money as they did:—

Held, that the document could not be described as a cheque, because it was not a bill of exchange within the meaning of the Bills of Exchange Act, 1882, which, by s. 73, defined a cheque as a " bill of exchange drawn on a banker payable on demand," and, by s. 3, sub-s. 1, defined a bill of exchange as " an unconditional order in writing, addressed by one person to another . . . . requiring the person to whom it is addressed to pay . . . . money to or to the order of a specified person, or to bearer." The word " cash " could not be described as a " specified person." The document was not payable either to a specified person or to bearer, and, therefore, failed to satisfy s. 7 of the Bills of Exchange Act, 1882, which required that there must be a payee.

The document must therefore be construed in accordance with the apparent intention of those who drew it. The printed words "or order," being inconsistent with the apparent intention of the drawers, must be neglected in favour of the written word "cash."

Held, therefore, that the document was a good direction to the bank to pay 250*l*. to bearer. The defendant bank having paid the money in accordance with that direction, the action failed.

Glynn v. *Margetson & Co.* [1893] A. C. 351 applied.

Action tried by Branson J. without a jury.

On November 16, 1933, the plaintiff company, the North and South Insurance Corporation, Ld., requiring further capital, entered into an agreement with the L. & W. Debenture Corporation, Ld., under which, on certain conditions, the L. & W. Debenture Corporation, Ld. were to find further capital for the plaintiff company and to receive certain remuneration for doing so. It was a term of that agreement that certain persons who were directors of the L. & W. Debenture Corporation, Ld., should join the board of the North and South Insurance Corporation, Ld.

Before anything substantial could be done in the way of finding capital for the North and South Insurance Corporation, Ld., the Board of Trade, on November 22, 1933, presented a petition for the compulsory liquidation of that company.

On November 29, 1933, the directors of the North and South Insurance Corporation, Ld., wished to pay to the L. & W. Debenture Corporation, Ld., a sum of 250*l*. To procure such a payment out of the funds at the credit of the North and South Insurance Corporation, Ld., with the National Provincial Bank, Ld., they brought into existence a document, which was partly printed and partly in writing. The printed form was suitable for being filled in to make a cheque payable to order. It contained a blank space for the name of the payee to be filled in, followed by the words "or order." The document was made out in the form "pay cash or order." The word "cash" was in writing and the words "or order" were printed.

The document was handed to a Mr. Black, who was the chairman of both the North and South Insurance Corporation, Ld., and the L. & W. Debenture Corporation, Ld., and Mr. Black paid it into his own account with Lloyds Bank, and

Lloyds Bank presented it to the National Provincial Bank in the ordinary way of bank accounting and it was paid. The result of the transaction was that the money passed from the account of the North and South Insurance Corporation, Ld., with the National Provincial Bank, through the hands of Mr. Black, to the L. & W. Debenture Corporation, Ld. The document was not crossed, nor was it endorsed.

On December 18, 1933, a compulsory winding up order was made against the North and South Insurance Corporation, Ld., and a liquidator was appointed, who, acting under s. 173 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), attempted in the first place to recover the sum of 250*l.* from the L. & W. Debenture Corporation, Ld. But, by that time, the L. & W. Debenture Corporation, Ld., had itself gone into liquidation, and the liquidator having ascertained that any attempt to recover the money from that company would probably be fruitless, sought to recover the amount from the National Provincial Bank, Ld.

The plaintiffs, the North and South Insurance Corporation, Ld. (in liquidation), claimed from the defendants, the National Provincial Bank, Ld., a declaration that the defendants were bound to repay to the plaintiffs, or to credit in account with the plaintiffs, a sum of 250*l.*, wrongfully debited against them and any interest charged or debited in respect thereof by the defendants.

By their statement of claim, the plaintiffs said that on December 4, 1933, the defendants credited a sum of 250*l.* to Lloyds Bank, Ld., and debited the plaintiffs' account with that sum, and charged the plaintiffs interest thereon; that the defendants had no authority to make this payment, or to debit the plaintiffs' account with it, or to charge the plaintiffs interest on it; and that they had demanded repayment from the defendants and, as the defendants refused to repay, they brought this action.

The plaintiffs claimed (*a*) a declaration that the defendants were bound to repay to them or credit their account with the 250*l.* and the interest which had been charged on it; and/or (*b*) payment or a credit in account of that sum and interest;

and/or (*c*) such further or other relief as the Court might think fit, including interest under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41).

By their defence, the defendants formally denied the plaintiffs' allegations, and said that the plaintiffs' account was properly debited with the 250*l.*, which was the amount of a cheque for 250*l.* drawn, signed and issued by the plaintiffs, such cheque being payable to cash or order. Alternatively, the defendants said that the proceeds of the cheque were received by Lloyds Bank for the credit of Mr. Black, who had an account with their Manchester branch. They said that Mr. Black received the sum on account of some debt or other liability owing or incurred by the plaintiffs to him. They further said that that debt or liability was paid or discharged as a result of the transactions, whereby the plaintiffs received value for the payment.

In the further alternative, the defendants said that the cheque was debited to the plaintiffs on December 4, 1933, and the plaintiffs, knowing that their account had been so debited, ratified or adopted the transaction and made no complaint about it until February, 1935, and could not now repudiate.

F. J. Tucker K.C. and *James Wylie* for the plaintiffs. The document in question was a cheque drawn to order. The words " pay cash or order " should be construed as a direction to " pay to me or to my order " : see *Chamberlain* v. *Young*. (1) A cheque drawn to order requires endorsement. As the document in question was not endorsed, there was no proper mandate given to the National Provincial Bank entitling them to pay out the 250*l.* in the way in which they paid it. A cheque is a bill of exchange, and a bill of exchange is defined in the Bills of Exchange Act, 1882, as an unconditional order in writing to pay to, or to the order of, a specified person or bearer. The law requires some certainty with regard to the payee of a cheque. By s. 7, sub-s. 3, of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61) : " where the payee is a fictitious

(1) [1893] 2 Q. B. 206.

or non-existent person the bill may be treated as payable to bearer," but a document drawn to pay "cash" may not be a bill of exchange at all. The payee of a bill of exchange must be a person who is capable of being ascertained. Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty: see s. 7, sub-s. 1. The defendants had no authority to pay the money and had no authority to debit the account of the plaintiff company with the 250*l.* and interest.

[*Bank of England* v. *Vagliano Brothers* (1); *Rex* v. *Randall* (2); *Clutton* v. *Attenborough & Son* (3); and *Cowie* v. *Stirling* (4), were referred to.]

F. P. M. Schiller K.C. and *P. B. Morle* for the defendants. The document in question, if it is a cheque, is on its true construction a bill of exchange payable to a fictitious person within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, and is therefore payable to bearer. If it is not a bill of exchange payable to bearer, it is not a cheque, but is merely an order directed to the bank, to pay cash to anybody who presents the document. It was a mandate to the bank which the bank understood and acted on in the way in which it was intended by the directors of the plaintiff company that the bank should act. The plaintiffs therefore cannot claim reimbursement of the money.

Tucker K.C. replied.

BRANSON J. [stated the facts and continued]: The ground on which the case for the plaintiffs is put is that the document in question was a cheque drawn to order, and therefore required to be endorsed. It was not endorsed, and on that ground it is said that there was no proper mandate given to the National Provincial Bank entitling the bank to pay the 250*l.* in the way in which they paid it.

The defence is put on two grounds. It is said, first of all, that if this document is a cheque, it is, on its true construction, a bill of exchange payable to a fictitious or non-existent person.

(1) [1891] A. C. 107.
(2) (1811) Russ. & Ry. 195.
(3) [1897] A. C. 90.
(4) (1856) 6 E. & B. 333.

Secondly, it is said that if the document is not a bill of exchange, it is merely an order directed to the bank, which the bank understood and acted on in the way in which it was intended by the plaintiff company, acting through its properly constituted officials, that the bank should act. It was contended that, the bank having dealt with the document in accordance with the directions and intention of the directors of the plaintiff company, the company had no claim to the reimbursement of the money which the bank paid in pursuance of that mandate.

The first question with which I have to deal is, whether this document was a cheque, and, if it was a cheque, was it a cheque drawn to a fictitious or non-existent person so as not to require endorsement and so as to enable it to be treated as a cheque payable to bearer.

In my opinion, the document cannot properly be called a cheque at all. It is true that it appears on a form intended to be filled up so as to be a cheque, but it was not so filled up. Under s. 73 of the Bills of Exchange Act, 1882, a cheque is defined as " a bill of exchange drawn on a banker payable on demand." Therefore, the first essential is that it should be a bill of exchange. A bill of exchange is defined by s. 3, sub-s. 1, of the Bills of Exchange Act, 1882, as " an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer." Sub-sect. 2 provides that " an instrument which does not comply with these conditions . . . . is not a bill of exchange."

I think that the words " or to the order of a specified person " mean that in order to constitute a document a bill of exchange it must contain an order directing the person on whom it is drawn to pay to a specified person. The present document. in the material part, reads, " Pay cash or order." " Cash " cannot be described as a " specified person." If any authority is wanted for that it is to be found in *Grant* v.

Vaughan (1), where a draft on a banker was worded "Pay to ship Fortune, or Bearer," and Lord Mansfield said (2): "There was no person originally named as the payee." Wilmot J. said (3): "No person at all is named: It is 'pay to Ship Fortune, or Bearer'." That case differs from the present, in that the words "or bearer" were on the document in that case, and not "or order" as in the present case. Mr. Tucker has contended, on the authority of *Chamberlain* v. *Young* (4), that the language of the document in this case ought to be construed as meaning "Pay cash to my order," or "to me or my order," but in my opinion, that case does not assist the plaintiffs, because there the bill was drawn payable "to —— order", without the word "or." In answer to an argument put forward that that was not a bill of exchange it was pointed out by the Court of Appeal that the word "or" did not appear in the document under consideration, and Lord Esher said (5) that the bill "is a perfect bill in every respect because it says 'Pay to —— order,' not 'Pay to —— or order.' In other words, it says, 'Pay to order,' and by the most common rules of construction that must mean 'Pay to my order'." In the document here in question, there is the word "or", the absence of which enabled the Court of Appeal in *Chamberlain* v. *Young* (4) to decide that the document under consideration in that case was a bill of exchange. Certain remarks were made by Lord Esher in that case with regard to the view he might have taken had the word "or" appeared in the document. But as it was not necessary in that case to express any judicial opinion on the point, Lord Esher said (6): "We think it is wiser not to determine the point judicially." So that except in so far as it appears that the presence of the word "or" might have made all the difference to the position in that case had it appeared, the case does not assist me in construing the document now before me, because, had the document in that case been "Pay —— or order," different considerations

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(1) (1764) 3 Bur. 1516.
(2) Ibid. 1523.
(3) 3 Bur. 1528.
(4) [1893] 2 Q. B. 206.
(5) Ibid. 209.
(6) Ibid. 206, 209.

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might have arisen. I should then have had to decide whether the old case of *Rex* v. *Randall* (1) still expressed the law, or whether I should accept the suggestion made by Lord Esher in *Chamberlain* v. *Young* (2) that the mere absence of the name of a payee did not prevent the document being a bill of exchange when, in all other respects, it appeared to have been intended to be used as a bill of exchange.

In approaching the construction of the present document the words " pay cash or order " must first be considered. " Cash " is not a payee, and the document was not drawn to pay any person at all. The document is not payable either to a specified person or to bearer, and it therefore fails to satisfy s. 7 of the Bills of Exchange Act, 1882, in what is an essential part of a bill of exchange. To come within s. 7 of the Act of 1882, there must be a payee, and this document has no payee. I find it difficult to say that the payee is in blank so that one could read it " Pay blank or order " and fill in the blank by putting in the word " me " instead of " cash." I am driven to look at the words of the document and give them the construction which the parties who brought the document into being apparently intended. There is authority for construing the language of documents in which there are written words inserted in printed forms. Lord Halsbury said in *Glynn* v. *Margetson & Co.* (3): " Looking at the whole of the instrument, and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract." Then he quotes from Lord Ellenborough's judgment in *Robertson and Another* v. *French* (4), and points out that if there are written words and printed words which are mutually inconsistent, you must reject the print in favour of the writing.

With that in mind I again turn to the document in question here. It says: " Pay cash or order." It cannot have been intended that " Cash," which is a purely impersonal collection of letters, should endorse this draft. That being so, I think the four words "Pay cash or order" cannot be read so as to give any sensible meaning to the whole four, and the result is that the printed words "or order" must be disregarded and we have a direction to pay cash—by necessary implication, to pay it to the bearer of the document.

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(1) Russ. & Ry. 195.

(2) [1893] 2 Q. B. 206, 209.

(3) [1893] A. C. 351, 357.

(4) (1803) 4 East 130, 135.

I have heard in the course of the evidence, and it is in accordance with one's own general knowledge of these matters, that the word "Cash," which appears in this document, may often appear in other documents of this kind as "Wages," or "Office," or some other impersonal thing, and I therefore do not read the word "Cash" in this document as directing the medium in which the payment is to be made, but as an order to pay some impersonal account which cannot endorse the document.

If that is correct, this action fails. But even if it could be said that this document does not contain a sufficiently clear mandate to justify its being acted on in that way, I find the following position. It came into being because the plaintiff company, acting through its properly constituted officials, desired to procure that the bank should pay to the person presenting this document the sum named therein. The bank understood it as it was intended to be understood and paid the money in accordance with the direction that the company intended to give. In these circumstances, it seems to me that it would be a blot on our legal system if the Court had to hold that, notwithstanding that the order was interpreted in the sense in which it was intended to be acted on, the giver of that order could now say that the bank had not properly fulfilled his mandate, and that, therefore, the bank must pay back the money which it had paid away in pursuance of the direction given.

For these reasons this action fails, and I must enter judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiffs: *Hill, Dickinson & Co.*
Solicitors for the defendants: *Wilde, Sapte & Co.*

T. W. M.

DENBY [WILLIAM] AND SONS, LIMITED *v.* MINISTER OF HEALTH.

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Oct. 29, 30;
Dec. 16.

Local Government—Housing—Clearance Order—Notice of Objection—Public Local Inquiry—Report to Minister of Health by person holding inquiry—Non-liability to disclosure—Rights of owners of property affected by clearance orders—Housing Act, 1930 (20 & 21 *Geo.* 5, *c.* 39), *ss.* 2, 11; *Sch. I.*

A person whose property is affected by a clearance order made by a local authority under the Housing Act, 1930, is not entitled to see the report made to the Minister of Health by the person whom the Minister has caused to hold a public local inquiry as required by Schedule I. of the Act.

Errington and Others v. *Minister of Health* [1935] 1 K. B. 249; *Board of Education* v. *Rice* [1911] A. C. 179; and *Local Government Board* v. *Arlidge* [1915] A. C. 120, considered.

Application by William Denby & Sons, Ld., under s. 11, sub-s. 3, of the Housing Act, 1930, for an order quashing two clearance orders made by the Urban District Council of Baildon, Yorkshire, and confirmed by the Minister of Health on October 5, 1934.

The following statement of the facts is taken from the judgment.

On June 12, 1934, the Urban District Council of Baildon made two clearance orders under Part I. of the Housing Act, 1930. William Denby & Sons, Ld., were owners of properties affected by such orders and they duly caused notice of objection against the inclusion of their properties in the orders to be lodged with the Minister of Health. On July 17, 1934, the Minister of Health, in pursuance of para. 4 of the First Schedule to the Act, caused a public local inquiry to be held by Mr. J. S. Todd, A.M.I.C.E. The company were represented at that inquiry by a solicitor, and evidence was given, on the one hand, by the local authority in support of the confirmation of the clearance orders, and, on the other hand, on behalf of the company in support of their objection and in opposition to the confirmation of the clearance orders. A note of the evidence given at such inquiry was taken by Mr. Todd, and after the close of the hearing of the evidence he visited and inspected all the properties included in the clearance orders. On October 5, 1934, the Minister of Health confirmed the clearance orders, only excluding therefrom a portion of the properties belonging to the company.

The company applied to the High Court under s. 11 of the Act of 1930, desiring to question the validity of those orders on the ground that they were not within the powers of the Act, or that some requirement of the Act had not been complied with, the contention being that the confirming orders were made by the Minister without giving the company an opportunity of seeing the report made to the Minister by Mr. Todd, the person who held the public local inquiry.

On their behalf it was alleged that as the Minister confirmed the clearance orders (with the exception mentioned), the company feared that the report contained adverse statements regarding the company's property, which adverse statements (if any) the company had had no opportunity of contradicting, or offering observations on, to the Minister.

H. A. Hill for the applicants. The clearance orders are invalid within s. 11, sub-s. 3, of the Housing Act, 1930, on the ground that they were confirmed by the Minister of Health without giving the applicant company, whose property is affected by the clearance orders, an opportunity of seeing the report made to the Minister by the inspector who held the inquiry. The Minister of Health is a person exercising quasi-judicial duties. He has to decide between the local authority and the property owners whether a clearance order shall be confirmed or not: see *Errington and Others* v. *Minister of Health.* (1) As a quasi-judicial officer, the Minister is bound by the rules ordinarily applicable to such an officer. That is to say, he must not receive any information or entertain any matter which is not open to all the parties to the dispute which he has to determine. He is bound by the rules of conduct laid down in *Board of Education* v. *Rice.* (2) The Minister must act judicially at the time he receives the inspector's report. He starts being judicial when the scheme

(1) [1935] 1 K. B. 249.

(2) [1911] A. C. 179.

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is put forward, and he is a judicial officer right up to the end. The inspector who holds the public inquiry is not a judicial officer, but is merely a collector of information, which information the parties are entitled to see and comment on, before the Minister makes his decision: see *In re The Grosvenor and West End Terminus Hotel Co., Ld.* (1), and *Rex* v. *Local Government Board, ex parte Arlidge*, per Hamilton J. (2)

The present case is distinguishable from *Arlidge's* case in the House of Lords (3), because the position of the Local Government Board in that case differed from that of the Minister of Health under the Act of 1930.

Sir Donald B. Somervell S.-G., and *R. C. Essenhigh* for the Minister of Health. It is admitted that the Minister is a judicial officer from the time when notice of objection is given until the confirmation of the order. *Errington's* case (4) so decides, and it is admitted that the principles of that case govern the Minister up to the time he makes his final order. The Minister would be acting improperly if he received statements adverse to one or other of the parties without giving that party the opportunity of being heard. But in this case the applicants are seeking to put the report of the inspector who holds the public inquiry on the same basis as fresh evidence in *Errington's* case. (4) The relevant words of cl. 4 of the First Schedule to the Housing Act, 1930, are that the Minister "shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification." These words negative the proposition put forward on behalf of the applicants here. When the inspector is reporting to the Minister, he is not deciding the issue between the parties. The applicants are not entitled to see his report.

Cur. adv. vult.

1935. Dec. 16.—SWIFT J. read a judgment in which he stated the facts and continued: This application raises quite neatly the sole point whether a person whose property is affected by a clearance order made under the Housing Act, 1930, is entitled to see the report made to the Minister by the person whom he causes to hold a public local inquiry as required by Schedule I. of the Act.

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(1) (1897) 13 Times L. R. 309.

(2) [1914] 1 K. B. 160, 194.

(3) [1915] A. C. 120.

(4) [1935] 1 K. B. 249.

On behalf of the applicants it is said that the Minister is a person exercising quasi-judicial duties; that he has to decide as between the local authority and the property owners whether a clearance order shall be confirmed or not, that it is therefore his duty to hear both sides and not to receive anything behind the back of one without giving him an opportunity of explaining or controverting such evidence, and that if he receives a report from some one whom he has appointed to inquire, he must let the parties know what such report is, before he acts upon it, so as to give them an opportunity of making such answer as they may desire.

The applicants rely on *Errington and Others* v. *Minister of Health* (1) for the proposition that the Minister of Health is a quasi-judicial officer, bound by the rules ordinarily applicable to such an officer, and that those compel him not to receive any information or to entertain any matter which is not open to all the parties to the dispute which he has to determine.

There is no doubt, as held by the Court of Appeal in that case and admitted before me in argument in this case, that once notice of objection has been given to a clearance order the Minister of Health must be regarded as a person exercising quasi-judicial functions, and he is bound by the rules of conduct applicable to such a person and laid down in the *Board of Education* v. *Rice*. (2) In that case Lord Loreburn, speaking of departments and officers of State invested with duties and powers of deciding questions involving the interests of citizens of the State said (3): "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts"—the Government Department which was involved in that case was the Board of Education. "I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

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(1) [1935] 1 K.B. 249.

(2) [1911] A. C. 179.

(3) Ibid. 182.

But I do not think that this disposes of the matter. I do not think that it is right to say that the Minister of Health or any other officer of the State who has to administer an Act of Parliament is a judicial officer. He is an administrative officer, carrying out the duties of an administrative office, and administering the provisions of particular Acts of Parliament. From time to time, in the course of administrative duties, he has to perform acts which require him to interfere with the rights and property of individuals, and in doing that the courts have said that he must act fairly and reasonably; not capriciously, but in accordance with the ordinary dictates of justice. The performance of those duties entails the exercise of the Minister's discretion, and I think what was said by Lord Halsbury in *Sharp* v. *Wakefield and Others* (1) is important to consider with reference to the exercise of such discretion. He there said: "'Discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's* case (2); according to law, and not humour.

(1) [1891] A. C. 173, 179.

(2) (1598) 5 Rep. 99*b*, 100*a*.

It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."

To describe the qualities which the Minister must exercise in carrying out such part of his administrative duties, the courts have referred to them as "quasi-judicial." Although this is a convenient term for describing the principles by which he must be guided in performing certain of his duties, I do not think that it means that he at any time occupies the position of a judge, and what is true of him is I think equally true of persons whom he is empowered to obtain assistance from in the discharge of his duties.

The Housing Act, 1930, says that the Minister shall cause an inquiry to be held, and that he shall consider, among other things, the report of the person who held the inquiry, and shall then confirm or refuse the order.

It was argued before me that the person who held the inquiry was not a judicial functionary but was merely a collector of information, which information the parties were entitled to see and to comment on before the Minister made his decision. In support of this contention my attention was called to *In re The Grosvenor and West End Terminus Hotel Co., Ld.*, (1) and to the observations of Hamilton L.J. in *Rex* v. *The Local Government Board, ex parte Arlidge* (2), where he says: "As the inspector does not perform any judicial function in reporting, the privilege which he could claim for his statements, if sued for libel, would be a qualified privilege only and not absolute."

I do not think that this is the right view to take of the position of the person who holds the inquiry. He is, in my opinion, an administrative officer helping in the administration of the Act of Parliament, but he comes more nearly to the position of a judicial functionary, or as nearly to that position as the Minister himself does.

It seems to me obvious that he, in discharging his duties, must be bound by the dictates of natural justice. His inquiry must be an inquiry which is fair to all parties interested. He must hear everything which any of them desire to say and should not hear anything without giving an opportunity to the other parties interested to answer that which is said; he should not receive anything from one behind the back of the other, and although he is not bound in any sense by the rules of evidence or procedure which apply to an ordinary court of law, he must, before making his report, comply with the ordinary dictates of natural justice as to the obtaining and consideration of the matters which go to form the opinions or conclusions which he expresses in his report.

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(1) 13 Times L. R. 309.

(2) [1914] 1 K. B. 160, 194.

I have recently dealt with the position of the person holding such a public local inquiry in the case of *Marriott* v. *Minister of Health.* (1) I do not need to add anything to the views which I therein expressed, and unless and until those views are modified or corrected by some higher tribunal they express my opinion with regard to the position of such person.

This being, as I conceive it to be, the position of the two officers, the Minister of Health and the person appointed by him to hold the public local inquiry, the question arises whether the parties are entitled to see the report which the latter makes to the former as the result of his inquiry.

I should have thought that the matter was conclusively decided by the case of *Local Government Board* v. *Arlidge* (2), were it not for a distinction which is sought to be drawn on behalf of the applicants between the facts relating to the position of the Local Government Board in that case, and to that of the Minister of Health in the present case.

The case of *The Local Government Board* v. *Arlidge* (2), was decided on s. 17 of the Housing, Town Planning, etc., Act, 1909, which gave to the owner of the dwelling-house dealt with under a closing order made under that Act a right of appeal to the Local Government Board. By s. 39 of the Act it was provided that the procedure on any such appeal should be such as the Local Government Board might by rules determine—provided that the rules should provide that the Board should not dismiss any appeal without having first held a public local inquiry.

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(1) (1935) 52 Times L. R. 63.

(2) [1915] A. C. 120.

It was held in that case that an appellant to the Local Government Board was not entitled as of right as a condition precedent to the dismissal of his appeal either to be heard orally before the deciding officer, or to see the report made by the Board's inspector on the public local inquiry.

By s. 39 the duty was placed on the Local Government Board to hold the public inquiry, and the House of Lords held that in holding such an inquiry the Local Government Board was in the position of an administrative officer to whom the decision of a question in dispute had been entrusted. Lord Haldane said (1): "My Lords, it is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from Courts of Justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported. My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing

(1) [1915] A. C. 120, 132.

obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board of Education* v. *Rice* (1) he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on everyone who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus."

Although the statute imposes on the Local Government Board the duty of determining the appeal, it was recognized that the ordinary procedure of the Local Government Board necessitated the actual holding of an inquiry before some individual, and Lord Haldane went on to say (2): "My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute of the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament

(1) [1911] A. C. 179.

(2) [1915] A. C. 120, 133.

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like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of 33 & 34 Vict. c. 70, the Act constituting the Local Government Board to which I have already referred. Provided the work is done judicially and fairly in the sense indicated by Lord Loreburn, the only authority that can review what has been done is the Parliament to which the Minister in charge is responsible. The practice of the department in the present case was, I think, sufficiently shown by Sir Horace Monro's affidavit to have been followed. In accordance with that practice the Board, in order to obtain materials with which to decide, appointed one of its health inspectors to hold a public inquiry. This was in accordance with the rules it had made under the section of the statute which I have quoted and with its usual practice. It is said that the report of the inspector should have been disclosed. It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so, any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to. It is plain from Sir Horace Monro's affidavit that the order made was the order of the Board, and so long as the Board followed a procedure which was usual, and not calculated to violate the tests to which I have already referred, I think that the Board was discharging the duty imposed on it in the fashion Parliament must be taken to have contemplated when it deliberately transferred the jurisdiction, first, from a court of summary jurisdiction to the local authority, and then, for the purposes of all appeals, from quarter sessions to an administrative department of the State."

Under the statute which I am now considering the burden is not put on the Minister of Health of himself holding the inquiry; his obligation is to "cause an inquiry to be held" and to consider the report made to him as the result of such inquiry.

It is contended that the Legislature meant to draw a distinction between the position of the Local Government Board under the Act of 1909 and that of the Minister of Health under the Act of 1930, and a distinction so marked that the report passing from an inspector under the earlier Act differs from the report made to the Minister of Health under the later Act. I do not think that any such distinction can properly be drawn. It seems to me that in altering the phraseology the Legislature meant to make clear that, as was said in *Local Government Board* v. *Arlidge* (1), the Minister was not bound to hold the public local inquiry himself, but I do not think that they have used language which implies that there should be any alteration in the nature of the report made on such inquiry.

The Minister of Health is an administrative officer, who has imposed on him the duty of deciding whether an order of the local authority shall or shall not be effective. In deciding this matter the Minister of Health, like the Local Government Board, must act in accordance with the dictates of natural justice which have been laid down by the courts.

If, either by the necessities of their office or the instructions of the statute creating and empowering them, some of their duties have to be carried out by other persons, those other persons are bound by the like considerations, but I do not think there is anything in the changed phraseology of the Acts creating these two different authorities which either obliges or entitles me to hold that while the report made by one subordinate to his principal is not subject to disclosure, the other is.

I think it was as true to say in 1930 as it was to

(1) [1915] A. C. 120.

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say in 1915, and as was said by Lord Shaw in *Local Government Board* v. *Arlidge* (1): "My Lords, how can the judiciary be blind to the well known facts applicable not only to the constitution but to the working of such branches of the Executive? The department is represented in Parliament by its responsible head. On the one hand he manages its affairs with such assistance as the Treasury sanctions, and on the other he becomes answerable in Parliament for every departmental act. His Board—that is, all the members of it together—may never meet, or they may only be convened on some question of policy; but a determination, signed and sealed and issued in correct form, stands as the deliverance of the Board as such, for which determination the President becomes answerable to Parliament. This is the general rule, acknowledged and familiar, of departmental action and responsibility. With regard to the making of this rule, however, and on the assumption that the grotesque demand to individualize the department for private purposes is put on one side, the next proposition is this, that when a public local inquiry has been held in compliance with statute, the person whose interests are affected is entitled to something more, namely, a disclosure of the views of the inspector written out by him, in jottings or otherwise, for the guidance or consideration of the department in dealing with the case. My Lords, it is here (and the matter is not a strictly legal one) that I venture to hold an opinion somewhat different from that of Lord Sumner. I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure. And I feel certain that if it were laid down in Courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants and consultants of various degrees of experience, many of whose opinions may differ but all of which form the material for the ultimate decision. To set up any rule that that decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action. This is, in my opinion, implied as the legitimate and proper consequence of any department being vested by statute with authority to make determinations."

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(1) [1915] A. C. 120, 136.

In the same report Lord Moulton said (1): "In the present case, however, the Legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals. Parliament has wisely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the Courts, and it is not their business to add to or take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not. In the present case they appear to me to be abundantly sufficient to secure that the Local Government Board shall be fully seised of the facts of the case in which it is called in, and that it can and will get all necessary guidance as to the law. But even if my opinion were the reverse it would only indicate that I disapproved of the legislation. It could not give rise to any question as to the statutory procedure conforming or not conforming to any notions of my own as to 'natural justice.' I shall not, therefore, deal specifically with any of the points on which the majority of the Court of Appeal have criticized the procedure of the Local Government Board on abstract grounds, but there is one point which needs notice, namely, the claim that the respondent was entitled as of right to see the report of the inspector who held the public inquiry. No such right is given by statute or by an established custom of the department. Like every administrative body, the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the department should be made public. It would, in my opinion, cripple the usefulness of these inquiries. It is not for me to express my opinion of the desirability of an administrative department taking any particular course in such matters, but I entirely dissociate myself from the remarks which have been made in this case in favour of a department making reports of this kind public. Such a practice would, in my opinion, be decidedly mischievous."

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(1) [1915] A. C. 120, 150.

Taking therefore, the view, as I do, that both the Minister of Health and the person whom he causes to hold the inquiry are persons who, in arriving at their decision, must act judicially in the sense I have mentioned above, I see no reason for holding that such a report is liable to disclosure ; on the contrary, I am of opinion that it is not.

This being the only point to be determined in this application I am of opinion that the application fails and must be dismissed with costs.

Application dismissed.

Solicitors for the applicants : *Turner & Co., for W. B. D. Shackleton, Bradford.*

Solicitor for the respondent : *The Solicitor to the Ministry of Health.*

T. W. M.

FLEETWOOD-HESKETH *v.* COMMISSIONERS OF INLAND REVENUE.

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Revenue—Stamp Duty—Settled estate—Sale of absolute reversion—Receipt for payment of purchase money on the sale—No other document relating to the sale—Conveyance on sale—" Contract or agreement made . . . . for the sale of any equitable estate or interest "—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 54, 59.

In 1932 a father was tenant for life under the will of a testatrix who died in 1898 of the settled estates (which then consisted mainly of investments) and his son was tenant in tail in remainder. An arrangement was made between the father and the son by which the son was to disentail and the father to purchase from him for 160,000*l.* his absolute reversion in certain of the investments, the son taking over from the father his liability to pay an annual sum to his wife during her life. This sum of 160,000*l.* was then applied in purchasing some of the investments which had thus become the father's property. The only document relating to the sale of the son's reversion for 160,000*l.* was an acknowledgment signed by the son and dated December 14, 1932, by which the son acknowledged the receipt from the father of the sum of 160,000*l.*," being the purchase price agreed as part of a family arrangement for my absolute reversion under the will . . . . and a disentailing deed . . . . expectant on the life interest " of the father under the will in the investments mentioned in the Schedule thereto.

Finlay J. held that the acknowledgment was chargeable as a conveyance on sale within s. 54 of the Stamp Act, 1891, with the ad valorem stamp of 1*l.* per cent. on the value of the reversion, because it was a contemporaneous record of the transaction of sale:—

Held, by the Court of Appeal that the acknowledgment was chargeable with this ad valorem duty as an agreement for sale within s. 59 of the Stamp Act, 1891.

Whether the acknowledgment was chargeable as a conveyance on sale within s. 54 of the Act *quære.*

APPEAL from a decision of Finlay J. on a case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

Under the will (hereinafter referred to as " the will) " dated August 17, 1896, of Anna Maria Alice Hesketh (which was proved with three codicils on December 29, 1898), lands and hereditaments in or near the borough of Southport were limited and settled (subject to certain terms of years granted to trustees upon trusts which had in 1932 been satisfied) to the use of Charles Hesketh Fleetwood-Hesketh (hereinafter called "the father)" for his life with remainder to the use of his first and other sons successively according to seniority in tail male. Roger Fleetwood Fleetwood-Hesketh (hereinafter called "the son") was the eldest son of the father, and was born on July 28, 1902.

Before the execution of the deeds and documents hereafter mentioned a family arrangement was made by which the father was to purchase from the son for 160,000*l.* his absolute reversion under the will and a disentailing deed to be executed by him in certain investments forming part of the settled property (which then consisted in the main of investments representing the proceeds of a large part of the settled estate). The sum of 160,000*l.* was in excess of the value of this reversion, but it was a term of the arrangement that the son should take over the liability for certain annual payments which the father had covenanted to make to his wife during her life by a deed of separation dated January 4, 1923.

By a disentailing deed dated December 14, 1932, by which the son disentailed and the father joined to give his consent as protector and to convey his life interest, the real estate (then remaining unsold) was conveyed to George Cockshott in fee simple upon such trusts as the father and son should by deed jointly appoint, and in default of and subject to such appointment upon the same trusts as were in existence immediately before the execution of the deed; and the money and investments and other personal estate subject to the trusts of the will were transferred to George Cockshott to hold subject to the father's life interest but discharged from the estate or interest in tail male of the son in trust for the son absolutely.

In pursuance of the arrangement an acknowledgment dated December 14, 1932, was signed by the son in the following terms: "I Roger Fleetwood Fleetwood-Hesketh . . . . hereby acknowledge that I have this 14th day of December 1932 received from Major Charles Hesketh Fleetwood-Hesketh . . . . the sum of 160,000*l.* being the purchase price agreed as part of a family arrangement for my absolute reversion under the will of Anna Maria Alice Hesketh deceased dated the 17th day of August 1896 and a disentailing deed dated the 14th day of December 1932 and made between the said Charles Hesketh Fleetwood-Hesketh of the first part myself of the second part and George Cockshott of the third part expectant on the life interest of the said Charles Hesketh Fleetwood-Hesketh under the said will in the investments and cash mentioned in the Schedule hereto standing in the joint names of the trustees of the said will."

A schedule of investments was annexed.

The rest of the arrangement between the father and the son was then carried out by the son entering into a deed of covenant dated December 14, 1932, to secure the payments of annual sums payable to his mother during her life under the deed of separation ; and immediately thereafter a deed of variation and release was entered into relieving the father from all liability for these payments.

The son then purchased by way of investment from the father with the sum of 160,000*l.* part of the securities in respect of which the father had purchased the son's reversion, and at the request of the father and son and upon their entering into a deed of release and indemnity dated December 23, 1932, with the trustees of the will the investments so purchased by the son were transferred to him and the remainder of the investments, the reversion in which had been sold by the son to the father, were transferred to the father.

The question raised by the case was what stamp duty was chargeable upon (amongst other deeds and documents) the acknowledgment dated December 14, 1932.

It was stated in the case that the Commissioners had been informed that there was no deed or agreement or assignment in existence relating to the acquisition by the father of the son's reversion other than the documents already mentioned. The Commissioners were further informed that the 160,000*l.* paid to the son for his reversion represented 57 per cent. of the total value of the investments comprised in the reversion, while the actuarial value of the reversion was 52 per cent. thereof, and accordingly that the part of the 160,000*l.* which was in excess of the value of the reversion was 5 per cent. of the fund or about 14,000*l.*, which might be taken to be the apportioned consideration for the obligation in favour of his mother undertaken by the son.

The Commissioners were of opinion that on the facts brought to their notice there had been two sales, one by the son to the father of his reversion and the other by the father to the son of certain investments; and that the acknowledgment was liable to ad valorem duty under the head of charge "Conveyance or Transfer on Sale" in the First Schedule to the Stamp Act, 1891, as being either a conveyance on sale of the son's reversion or an agreement for sale, liable to ad valorem duty as a conveyance on sale under s. 59 of the same Act, either of an equitable interest in property or of property not falling within any of the exceptions mentioned in sub-s. 1 of the section. They further held that the apportioned consideration for such sale on which ad valorem duty was payable was 160,000*l.* less 14,000*l.* or 146,000*l.* The Commissioners accordingly assessed the acknowledgment to 1460*l.* ad valorem duty.

Finlay J. dismissed an appeal from this decision, holding that while the acknowledgment did not resemble the ordinary idea of a conveyance on sale, it was chargeable to duty as such on the authority of *Horsfall* v. *Hey* (1) and *Garnett* v. *Inland Revenue Commissioners* (2) as the contemporaneous record of the transaction of sale.

The father and the son appealed. The appeal was heard on July 11, 1935.

Gavin Simonds K.C. and *F. McMullan* for the appellants. The acknowledgment of December 14, 1932, was merely a receipt and not a "conveyance on sale" within the meaning of s. 54 of the Stamp Act, 1891. By that definition a conveyance on sale must be an instrument or a decree or order of the Court "whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction." How can it be said that the acknowledgment transferred any property or interest? Here there was a verbal agreement to sell, but in order that stamp duty shall be payable there must be a document containing the agreement for sale or the conveyance.

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(1) (1848) 2 Ex. 778; 17 L. J. (Ex.) 266.

(2) (1899) 81 L. T. 633.

Finlay J. held that the acknowledgment must be stamped as a conveyance on sale as being a contemporaneous record of the transaction of sale. But the whole question is whether the document itself effected a transfer, and it clearly did not. Finlay J. relied on *Horsfall* v. *Hey* (1) and *Garnett* v. *Inland Revenue Commissioners*. (2) In the former case the document in question was a memorandum that A had sold to B certain goods and fixtures for 50*l*. That was held to be liable as a conveyance on sale. That case would not have been decided as it was if there had been an anterior oral agreement of sale. *Garnett* v. *Inland Revenue Commissioners* (2) has no application in the present case. It is the principle of *Ramsay* v. *Margrett* (3) which applies here.

[LORD HANWORTH M.R. Would the parties be content to tear up the acknowledgment in this case?]

Yes, apart from the fact that the purchaser requires to have evidence that he has paid the purchase money—not as a means of transferring the property sold. It is not a step in the transaction or any part of the actual transfer. The acknowledgment is not therefore liable to ad valorem stamp duty as a conveyance on sale by virtue of s. 54. So, too, the document is not an agreement for sale within s. 59. It is signed by one party only, and is in no sense an agreement for sale.

J. H. Stamp (*Sir T. Inskip A.-G.* with him) for the Crown. First, the acknowledgment is chargeable with ad valorem stamp duty under s. 59, which makes an agreement for sale of an equitable interest liable to tax as though it were a conveyance on sale. "Contract or agreement" in s. 59 includes

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(1) 2 Ex. 778; 17 L. J. (Ex.) 266.
(2) 81 L. T. 633.
(3) [1894] 2 Q. B. 18.

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a memorandum of an agreement. It makes no difference that a memorandum is not expressly mentioned there, although it is in the provision in the Schedule to the Act imposing a 6*d*. stamp on any " Agreement or memorandum of agreement . . . . not otherwise specifically charged with any duty " : compare s. 22 of the Act, where also a memorandum is not specifically referred to. Nor does the fact that the acknowledgment is signed by one party only make any difference. It is too narrow a view to say that s. 59 does not apply to a memorandum signed by one party.

Again, the acknowledgment is liable to ad valorem stamp duty as a conveyance on sale by virtue of s. 54 : *Chesterfield Brewery Co.* v. *Inland Revenue Commissioners* (1) ; *Ex parte Cooper*. (2) *Ex parte Cooper* (2) was considered and explained in *Woodgate* v. *Godfrey* (3) and *Marsden* v. *Meadows*. (4) A receipt operates in equity to transfer property, because it is a contemporaneous record inter partes of the passing of the property on the occasion of sale. The document contains a statement of everything necessary to make the purchaser the owner of the reversion. If in a document the vendor agrees to sell property the purchaser can claim the property and insist on its being transferred. If on the other hand a document states that the vendor has received a sum of money in consideration of the sale of a reversionary interest, all the elements of a conveyance on sale are present. A document, which is a contemporaneous record inter partes of all the facts necessary to establish the purchaser's immediate right to an equitable interest on the occasion of a sale and forms an integral part of the transaction of sale, is in equity a conveyance or transfer on sale. That is sufficient to bring this document within s. 54.

Gavin Simonds K.C. in reply. In order to bring this document within s. 59 it has to be shown that it is a contract or agreement for sale. There is no warranty for incorporating in the section the words " memorandum of sale." Here the acknowledgment was nothing more than a receipt for purchase money paid under a previous oral agreement and not itself the agreement for sale.

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(1) [1899] 2 Q. B. 7.
(2) (1878] 10 Ch. D. 313.
(3) (1879) 5 Ex. D. 24.
(4) (1881) 7 Q. B. D. 80.

LORD HANWORTH M.R. This case raises a difficult point. [His Lordship stated the facts.] It is claimed by the Revenue that the receipt or acknowledgment of December 14, 1932, ought to be charged to stamp duty ad valorem. But it is argued by Mr. Gavin Simonds that that receipt is of no value, that it could be put in the fire or destroyed, and that it has no effective result whatever. He so contends because, as he says, the transaction mentioned in the receipt was effected under an agreement orally made between the father and the son. The disentailing deed entered into as part of this agreement was put into writing; but the agreement for the sale of a block of securities was carried out by payment of the sum of 160,000*l*. on transfer of the securities, and this receipt, signed, as it was, by the son only is in no sense an agreement. The revenue contend, however, that the receipt falls within the definition of a conveyance on sale in s. 54 of the Stamp Act, 1891. That section provides: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf, or by his direction."

Finlay J. came to the conclusion, following *Horsfall* v. *Hey* (1) and *Garnett* v. *Inland Revenue Commissioners* (2), that this receipt was a conveyance on sale within the meaning of s. 54. I have some doubt and difficulty in following that decision, or rather I ought to say the reasoning on which it is based. I should like myself to withhold my opinion upon the effect of s. 54. In *Garnett* v. *Inland Revenue Commissioners* (2) Channell J. said: "On the whole I think there is not very much doubt about the matter, although it is, perhaps, a little difficult to give the very best possible reasons for the decision which I think must be right." If reasons

(1) 2 Ex. 778; 17 L. J. (Ex.) 266.

(2) 81 L. T. 633,638.

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cannot be given, I have some mistrust in the decision; but, paying all respect to what Finlay J. said, I am content to leave the matter as to s. 54 undecided, because I still remain in doubt about it.

I turn, however, to s. 59, to which our attention has been more specially directed by Mr. Stamp. That section enacts: "Any contract or agreement . . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold." It will be observed that that section imposes liability to tax on something less effective than an actual conveyance: a contract or agreement may be liable under s. 59 to pay ad valorem duty, although it is not an actual conveyance on sale of an estate. Comment was made that this document is signed by the recipient of the money only and not by the purchaser. To my mind that presents no difficulty, and, indeed, is of slender, if any, importance. What is needed is to have the signature of the person to be charged with the result of the deal, and at any time it will be possible to make good the lack of the father's signature by his adding what is really an unnecessary signature. If it had appeared on the receipt, it could have meant nothing. Just as in the case of a lease the signature by the landlord may alone be required, so, here, it was unnecessary to have more than the son's signature, which was the effective signature. Is the document, on that ground, any the less an agreement? It has been suggested that because there was an oral agreement antecedent to this document it might be put in the fire and the parties be no worse off. To my mind that will not do, because I think the parties as a part of their agreement intended that the agreement should be recorded; and by an agreement is meant the record of two minds which have become united for the purpose of the terms contained in the agreement. It seems to me that this document is one which it was the intention of the parties to bring into being, and which it was important—perhaps essential—for the father to hold as a record that the terms of the oral agreement had been fulfilled by him, and to make it clear that the securities which are there mentioned were securities to be received by the son. Even if that document did not amount to an actual conveyance, does it record something which is the subject-matter of an agreement by its reference to the son's interest in securities and the sale of that interest ? Having regard to the cases that have been referred to upon the Stamp Act, I have come to the conclusion that s. 59 does apply to this case. I am inclined to think that it might be misleading to apply the decisions under the Bills of Sale Act. It is, however, important to bear in mind the observations that if a transaction can be established independently of any document in writing, there is nothing requiring to be registered under the Bills of Sale Act, and if no registration is required the fact that there is a document which has not been registered does not invalidate the transaction, which stood proprio vigore without any document at all. So far that is reasoning that may well be applied to this case ; but when we go deeper into these cases I am inclined to think that we tend to depart from the consideration of the relevant matters in the present case.

I have come to the conclusion that this receipt is a record, a necessary record, an intended record, of an agreement made between the parties, and itself not less an agreement because it is signed only by one of the parties ; that it is the record of an agreement which is within the words in s. 59, and therefore liable to ad valorem stamp duty.

It will be noted that my judgment is directed to a different section and to different considerations from those which influenced Finlay J. Without saying any more about his decision, I prefer to put my judgment upon these different grounds. The result is that the appeal must be dismissed with costs,

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ROMER L.J. The first question argued upon this appeal and the question which was alone considered by Finlay J. in the Court below, is whether the document with which we have to deal is a conveyance or transfer on sale within s. 54 of the Stamp Act, 1891, which provides: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf, or by his direction." It appears to me that the question to be decided on this part of the case is whether this document, which is in form a receipt and purports to be nothing more than a receipt, did transfer or vest in the person who paid the purchase money, any interest whatsoever in the property for which the purchase money was paid.

The question whether a particular document does or does not transfer or convey an interest is not to be determined by considering what name the parties themselves have given to the document. A document may be called a receipt or a memorandum of a sale and yet it may appear that it is a document by which an interest in property has passed. Instances of such cases have been brought to our attention. The first is *Horsfall* v. *Hey*. (1) In that case there was a document signed by both parties to the transaction which purported to record that "AB has sold to CD all the goods, stock in trade, and fixtures in a certain shop for 50*l*."; and it was held that notwithstanding the use of the past words that document according to its true construction meant: "AB hereby sells to CD." In that case no property had passed from AB to CD before the document was signed, and if property had passed at all from AB to CD (and everybody admitted that it had) it passed by virtue of that document and nothing else. It was admitted that the right to sever the fixtures had passed to CD. How had this right passed to CD? By that document and nothing else. It was accordingly held that it was a transfer on sale.

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(1) 2 Ex. 778; 17 L. J. (Ex.) 266.

To much the same effect was the next case to which our attention was called of *Garnett* v. *Inland Revenue Commissioners*. (1) There the Court was concerned with the dissolution of a partnership, and a deed which in terms amounted to little more than a receipt and acknowledgment was held by the Court to have been the document which effected the dissolution and caused the interest in the property mentioned in the deed to pass from one party to another. *Ex parte Cooper* (2) was the third of these cases. There a receipt had been given, and it was held in the Court of Appeal that the document, although in form a receipt, was a complete assurance ; it was the document which conferred the title upon the purchaser. That was pointed out by the Court of Appeal in *Woodgate* v. *Godfrey*. (3) Commenting on *Ex parte Cooper* (2), Sir George Jessel said : " We have had the benefit of some remarks made by Thesiger L.J. as to that case, and those remarks show that the decision may be explained upon an intelligible principle. That principle is, that independently of the document there was no sale of the goods, that there was one transaction constituted by the inventory and the receipt thereto attached, and that if there had been no document there would have been no transaction." The principle to be applied in these cases was also stated by Lord Esher in *Ramsay* v. *Margrett*. (4) He said : " If a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase money, it is, by s. 4, to be deemed to be a bill of sale, though it is not so in fact. But, if the document is not intended to be part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale." The mere fact that the document in question was intended to be part of a complicated transaction between the parties is not sufficient : the document must be " intended to be a part of the bargain"—by which I understand him to mean, a part of the machinery to pass the property from one to another. If it be that, then whatever the parties may choose to call it, it is a conveyance or transfer on sale.

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(1) 81 L. T. 633.

(2) 10 Ch. D. 313.

(3) 5 Ex. D. 24.

(4) [1894] 2 Q. B. 18, 23.

Applying those considerations to the present case, I would like to point out the almost unique character of the present transaction. The object of it was that Mr. Roger, the son, should have transferred to him a part of the securities representing capital trust moneys under the settlement in question. Accordingly, the son disentailed and turned his estate tail into an absolute interest. All that was necessary after that, to give complete effect to the transaction, was for the two of them to direct the trustees to transfer those securities to Mr. Roger. I have left out the initial bargain between the parties, that the son was to take upon himself the liability which the father up to then had been under to pay the divorced wife of the father a certain annual sum, or sums. Apart from that, all that was necessary was to transfer these securities to the son. Had that been done, the transfers would have been liable to be stamped with ad valorem duty by virtue of s. 74 of the Finance (1909–10) Act, 1910, which provides that "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale." Stamp duty would have been paid on the value of the property. For some reason which has not been explained to me the parties chose to carry out that comparatively simple transaction in the following way. After the disentailing deed the father purported to buy from his son, and the son purported to sell to the father, by oral agreement, the whole of his reversion for 160,000*l.*, and then the son agreed to invest the 160,000*l.* by purchasing from the trustees the securities that he wanted, leaving the other securities with the father. The result is that there are two contracts of sale: (1.) an oral contract by the son to sell to his father the reversion for 160,000*l.*, and (2.) a contract by the son to buy from the trustees these investments which he wanted for 160,000*l.*, with the result that the Crown are now claiming double ad valorem duty: ad valorem duty on the sale from the son to the father of the reversion and ad valorem duty on the sale by the trustees to the son of the securities for 160,000*l.* It does not matter what the reason was for the course adopted: but it will be observed that it was wholly unnecessary for there to be any formal transfer to the father of the son's reversion. As a rule, when a person buys even an equitable interest in property he is not content to rest merely upon an oral contract, or even a receipt: it is nearly always followed by a formal conveyance or transfer of the equitable interest. What I am emphasizing in the present case is that in this case no one wanted a formal conveyance of this equitable interest; such a conveyance would have been wholly unnecessary. That, I think, is a relevant consideration when we are asked to hold that this receipt was intended by the parties to be a conveyance of the property. It was not. It was, in my opinion, intended to be what it is expressed to be, merely an acknowledgment by the son of the receipt of 160,000*l.* The property passed when the oral agreement was made, and this receipt, although, no doubt, part of the transaction between the parties, was not a part of the bargain to vest the property in the father. With all respect to Finlay J., I am of opinion that this document is not a conveyance on sale.

Then comes the question whether it is not an agreement within the meaning of s. 59 of the Act. I will not read s. 59 again: it is sufficient to point out that it in effect provides that any contract or agreement for the sale of an equitable estate or interest in any property whatsoever shall be stamped with ad valorem duty as though it were a conveyance on sale of the equitable property. It has been pointed out on more than one occasion that the Stamp Act does not require transactions to bear stamp duty; it is dealing and dealing only with documents. Where, therefore, there has been an oral agreement of sale no stamp duty is exigible: but if the parties choose to make a record of the fact that they

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have entered into an agreement there seems every reason why stamp duty should be exigible. I cannot myself think that in s. 59 the Legislature intended to draw any distinction between the case where by a document in writing the parties record an agreement entered into at the time of signing the record by means of an offer and acceptance contained in the written document, and the case where they are making a record in writing of an oral offer and an oral acceptance, made, it may be, only a few days before. In my opinion, s. 59 does apply to a record made of an oral agreement arrived at between the parties, and I think no one can doubt that the document in this case contains a record of an agreement come to between the parties, a record that shows all the terms of that agreement.

Therefore, in my opinion, this document is not chargeable with stamp duty as a conveyance but is chargeable with ad valorem duty as an agreement or contract within the meaning of s. 59 of the Act.

Maugham L.J. I have arrived at the same conclusion as my brethren, that the appeal should be dismissed; but I ought to say (although I do so, having regard to what has fallen from my brethren, with some doubt about the matter) that I should be inclined to agree with the learned judge and to come to the conclusion that the so-called acknowledgment is liable to stamp duty under s. 54 of the Stamp Act. Inasmuch, however, as I agree with my brethren on the point under s. 59, which arises if the document is not liable to ad valorem stamp duty under s. 54, I can be brief on the question under this section; and I only make the observations I do because, as I have said, I think the learned judge was right, and because this case may conceivably go to another tribunal.

My view is founded upon the circumstance that the conveyance on sale, if there be a conveyance on sale within s. 54 here, is no more than an equitable assignment of property. I attribute considerable importance to the fact that an equitable assignment does not require any particular words to give it effect. I am not going to take up time by reading the well known speech of Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1) But I would like to add that even an endorsement in blank of company debentures has been held to be a good equitable assignment, and nobody I think has ever doubted that that is correct. I agree, however, that, although the precise form of words is immaterial, it is necessary to come to the conclusion, based on the surrounding circumstances and the terms of the document itself, that the parties intended that the property should pass in equity to the transferee. In approaching this matter I must state that, as I read the case, there is no justification for the view that there was a previous parole agreement for the transfer of the absolute reversion in question. I think the true view is that nothing was binding on any one until the documents referred to in para. 1 of the case were signed or exchanged—all of them dated December 14, 1932: and, there being no antecedent transfer by parole, I should, but for what my brethren have said, be inclined to hold that the so-called acknowledgment was sufficient to establish the fact that the parties intended that the absolute reversion should pass in equity to Major Fleetwood-Hesketh and was therefore a conveyance on sale.

But I am very glad to be able to proceed on the footing that I am wrong; and, on that footing I ask myself, what is the effect of s. 59? There does arise a rather curious point of construction there, having regard to the way in which the Stamp Act is drawn. Sect. 1 of the Act charges stamp duties upon the several instruments specified in the First Schedule to the Act; that is the charging section, and in one part of the Schedule we find that "Agreement or any memorandum of an Agreement" (I will not read the whole of it) is chargeable with a duty of 6*d*., and in another place that a conveyance on sale is chargeable with ad valorem duty. Then if we look at s. 54 we see a statement of what the expression "conveyance on sale" includes; and in s. 59 a statement that "any contract or agreement . . . . for the sale of any

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(1) [1905] A. C. 454, 462.

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equitable estate or interest in any property" is to be charged with the same ad valorem duty as if it were an actual conveyance on sale. It has been ingeniously argued that in s. 59 the phrase used is "any contract or agreement" and that it says nothing about "any memorandum," but when I look in the Schedule to ascertain what is the duty in respect of an agreement, I find that it uses the words "Agreement or any memorandum of an agreement" and that it contains in addition the words "whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument." The argument is that s. 59 will apply only to a contract or agreement of a somewhat formal character. I do not accept that view. I should point out that s. 22 of the Act is strongly against that construction. By s. 22 it is provided: "The duty of sixpence upon an agreement"—not mentioning a memorandum—"may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed." I do not suppose counsel for the appellant in this case would have been bold enough to suggest that during all the years since this Act has been in force the right course with regard to a memorandum of agreement was to pay the stamp duty under s. 22 by an impressed stamp. It is plain, as I think, from s. 22, that the word "agreement" includes a memorandum of agreement. But whether that be so or not, I think it is reasonably clear that any memorandum of agreement which contains all the terms of what has been or is being agreed between the parties is itself an agreement. It is true that only one party has signed the acknowledgment. It may be mentioned that the signature of such an acknowledgment is, of course, followed by the handing over of the receipt to the person who has paid the 160,000*l.*, which is expressed to be the purchase price agreed as part of the family agreement. But I do not rely upon that. To my mind it is clear, both on principle and on authority, that an agreement or a memorandum of agreement containing all the terms is certainly within s. 59 of the Act, even though one party only has signed it. It is the commonest possible thing for one party only to sign an agreement and to hand it over to the other party, being the person who is likely to want to enforce it. I may add that, so far as regards an agreement under the Act, it was long ago settled that it is immaterial that only one party signed it. If any authority is wanted for that it will be found in *Knight* v. *Barber* (1), where a note "Bought of Nathan Knight fifty shares . . . . at 10*l.* per share," which was signed by Barber, was held to require a stamp.

However, my conclusion on s. 59 is that, for the reasons I have given in addition to the reasons given by my brethren, the document which is called here an acknowledgment, containing as it did all the material terms of the bargain between the parties, was within the terms of s. 59 as being a contract or agreement for the sale of an equitable interest in the stocks, shares and securities in question, and was, therefore, stampable ad valorem.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co., for Buck, Cockshott & Cockshott, Southport; Solicitors of Inland Revenue.*

(1) (1846) 16 M. & W. 66.

H. C. G.

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Electricity—Supply—Local authority undertakers—Failure to appoint electric inspector for district—Meters—Supply to consumer of standard meter but not certified—Dispute between consumer and undertakers—Cutting off supply by undertakers—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *s.* 21—*Electric Lighting* (*Clauses*) *Act,* 1899 (62 & 63 *Vict. c.* 19), *Schedule, ss.* 35, 36, 49, 50, 57—*Electric Lighting Act,* 1909 (9 *Edw.* 7, *c.* 34), *s.* 18, *Second Schedule.*

By s. 21 of the Electric Lighting Act, 1882: "If any . . . . person neglect to pay any charge for electricity or any other sum due from them to the undertakers in respect of the supply of electricity to such . . . . person, the undertakers may cut off such supply . . . . and may, until such charge or other sum . . . . are fully paid, but no longer, discontinue the supply of electricity to such . . . . person."

By s. 18 of the Electric Lighting Act, 1909: "The undertakers may refuse to supply electrical energy to any person whose payments for the supply of electrical energy are for the time being in arrear (not being the subject of a bona fide dispute), whether any such payments be due to the undertakers in respect of a supply to the premises in respect of which such supply is demanded or in respect of other premises."

By s. 35, sub-s. 1, of the Schedule to the Electric Lighting (Clauses) Act, 1899: "The local authority, so long as they are not themselves the undertakers, and, while the local authority are themselves the undertakers, the Board of Trade on the application of any consumer or of the undertakers, may appoint and keep appointed, one or more competent and impartial person or persons to be electric inspectors under the special order."

Sub-s. 2: "If . . . . the local authority themselves become the undertakers for the purposes of the special order, the Board of Trade, on the application of any consumer, or of the undertakers, may appoint, and keep appointed, one or more competent and impartial person or persons to be electric inspectors under the special order."

Sect. 36, sub-s. 1: "The duties of an electric inspector under the special order shall be as follows:— . . . . (*b*) The certifying and examination of meters . . . ."

Sect. 49 (as amended by the Electric Lighting Act, 1909, Second Schedule): "The amount of energy supplied by the undertakers to any ordinary consumer under the special order, or the electrical quantity contained in the supply (according to the method by which the undertakers elect to charge), hereinafter referred to as 'the value of the supply,' shall, except as otherwise agreed between the consumer and the undertakers, be ascertained by means of an appropriate meter duly certified under the provisions of the special order . . . ."

Sect. 50 as amended: "A meter shall be considered to be duly certified under the provisions of the special order if it be certified by an electric inspector appointed under the special order to be a meter capable of ascertaining the value of the supply within such limits of error as may, as respects meters of the class to which the meter belongs, be allowed by the Board of Trade, and to be of some construction and pattern approved by the Board of Trade, and every such meter is hereinafter referred to as a 'certified meter.' . . . ."

Sect. 57: "If any difference arises between any consumer and the undertakers as to whether any meter, whereby the value of the supply is ascertained (whether belonging to the consumer or to the undertakers), is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter, that difference shall be determined upon the application of either party by an electric inspector or, where the local authority are the consumers, by an inspector to be appointed by the Board of Trade, and that inspector shall also order by which of the parties the costs of and incidental to the proceedings before him shall be paid, and the decision of the inspector shall be final and binding on all parties.

"Subject as aforesaid, the register of the meter shall be conclusive evidence in the absence of fraud of the value of the supply."

By s. 2 of the Electricity (Supply) Act, 1919: "The Board of Trade may exercise through the Electricity Commissioners any of their powers and duties under the Electric Lighting Acts or the orders or regulations made thereunder . . . ."

A local authority were the undertakers for the supply of electricity in their district, but no electric inspector had been appointed for that district, and consequently the meters which the local authority supplied to their consumers, although standard meters, were not duly certified as required by s. 49 of the Schedule to the Act of 1899. A consumer of electricity objected to the demand made upon him for electricity alleged to have been consumed by him during a summer quarter. He alleged that either the meter had incorrectly registered the amount consumed or that the meter had been incorrectly read. After a long correspondence the local authority cut off the consumer's supply of electricity, alleging that they had the right to do so under s. 21 of the Electric Lighting Act, 1882. In an action in a county court by the consumer for an injunction to restrain the local authority from cutting off his supply of electricity the county court judge held that there was a bona fide dispute between the consumer and the local authority as to the amount due and that therefore the local authority were not entitled to cut off the customer's supply of electricity by reason of s. 18 of the Electric Lighting Act, 1909. On an appeal by the local authority :—

Held, (1.) having regard to the finding of fact by the county court judge that there was a bona fide dispute between the parties the local authority were not entitled to cut off the consumer's supply of electricity by reason of s. 18 of the Electric Lighting Act, 1909, as the cutting off of a supply of electricity was a most effective and practical refusal of supply; (2.) that inasmuch as the meter furnished by the local authority to the consumer was not a duly certified meter as required by s. 49 of the Schedule to the Electric Lighting (Clauses) Act, 1899, the register of that meter was not conclusive evidence of the value of the supply.

APPEAL from a decision of the judge of the Bow County Court.

The plaintiff, Harold Joseph, was the occupier of certain premises in Barking Road, East Ham, where he lived with his family and carried on business as an estate agent.

The defendants, the East Ham Corporation, were the undertakers for the supply of electricity under the Electricity Acts for the district in which the plaintiff's premises were situated.

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In July, 1931, the plaintiff signed the usual application form for the supply of electricity by the defendants to his premises, and the defendants supplied the premises with electric light and power and installed a meter in the plaintiff's premises to register the amount of current supplied to him.

In 1932 the highest number of units of electricity supplied by the defendants to the plaintiff's premises during any quarter according to the meter was 552 units.

In 1933 during the	March	quarter	1602	units were	registered.
,,	June	,,	420	,,	,,
,,	Sept.	,,	169	,,	,,
,,	Dec.	,,	855	,,	,,
In 1934 during the	March	quarter	866	,,	,,
,,	June	,,	2021	,,	,,
,,	Sept.	,,	180	,,	,,
,,	Dec.	,,	412	,,	,,

On July 2, 1934, the defendants delivered to the plaintiff an account for electricity alleged to have been consumed on the plaintiff's premises between March 7 and June 7, 1934, namely, 2021 units, which was very much more than the number of units consumed on the plaintiff's premises during the corresponding quarter of the previous year.

The plaintiff thereupon protested that either the meter was out of order or that it had been incorrectly read.

The defendants demanded payment of the account, alleging that the meter had been tested by two of their employees and found to be registering correctly.

A long correspondence ensued. On July 16, 1934, the plaintiff sent to the defendants a cheque for 2*l.* 7*s.* 9*d.* in full settlement of the defendants' account, but that cheque was returned by the defendants.

On October 18, 1934, the defendants wrote to the plaintiff offering to reduce the excess consumption for the June quarter over that of the previous corresponding quarter by 50 per cent., making a reduction of 800 units, and enclosed an amended account for 5*l.* 0*s.* 4*d.*

On November 3, 1934, the plaintiff tendered 2*l.* 10*s.* 4*d.* in full settlement of his liability, but the defendants accepted that sum "on account" and they also gave notice that if the balance of 2*l*. 10*s*. was not paid within a week the supply of electricity would forthwith be discontinued.

The plaintiff's solicitors then wrote saying that inasmuch as a bona fide dispute existed as to the amount properly payable by the plaintiff, the defendants could not refuse to supply electricity.

On November 14, 1934, the defendants cut off the supply of electricity to the plaintiff's premises.

The plaintiff commenced proceedings in the Chancery Division of the High Court for an injunction to restrain the defendants from cutting off his supply of electricity.

On a motion for an interlocutory injunction the Court made no order, the plaintiff undertaking to abide by any order the Court might make as to damages, and the defendants undertaking, on payment to their solicitors of the sum of 2*l*. 10*s*., to be held by them as stakeholders, to re-connect the electric supply to the plaintiff's premises, and the action was transferred to the Bow county court.

No electric inspector had been appointed to certify and examine meters in the district for which the defendants were the undertakers, and the meters which the defendants supplied to their consumers, although made to a standard pattern, were not duly certified meters as required by s. 49 of the Schedule to the Electric Lighting (Clauses) Act, 1899, as amended by the Second Schedule to the Electric Lighting Act, 1909.

The county court judge held that there was a bona fide dispute between the plaintiff and the defendants and that therefore under s. 18 of the Electric Lighting Act, 1909, the defendants' act in cutting off the plaintiff's supply of electricity was wrongful.

The defendants appealed.

Croom-Johnson K.C. and *Amiend Jackson* for the appellants. The appellants were entitled under s. 21 of the Electric Lighting Act, 1882, to cut off the supply of electricity from the plaintiff's premises because he had failed to pay the

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appellants' charges in respect of the supply of electricity to him. The county court judge has wrongly applied s. 18 of the Electric Lighting Act, 1909, which gives undertakers a right to refuse to supply electrical energy to a person whose payments for the supply of electrical energy are in arrear (not being the subject of a bona fide dispute). There is a distinction between refusing a supply under s. 18 of the Act of 1909 and cutting off a supply under s. 21 of the Act of 1882. Sect. 18 is much wider than s. 21; a supply may be refused under s. 18 to a person who is in arrears with his payments although not in respect of the premises for which a supply is refused. The effect of s. 21 of the Act of 1882 is that the supply of electricity may be physically cut off from the premises in respect of which payments are in arrear, and there is no provision in that section preventing the exercise of that power in the case of a bona fide dispute. The two sections are applying two different sanctions. Sect. 18 of the Act of 1909 deals with a case where a supply is demanded and is refused, whereas s. 21 of the Act of 1882 deals with a case where a supply has already been given but which is cut off because the consumer has neglected to pay the undertakers' charges therefor. Under s. 57 of the Schedule to the Electric Lighting (Clauses) Act, 1899, the register of the meter is made conclusive evidence of the value of the supply, unless there is a difference between the consumer and the undertakers whether the meter is in proper order and either party has applied to have that difference determined by an electric inspector whose decision shall be final and binding. But unless either party invokes the aid of the electric inspector the meter is conclusive evidence as to the value of the supply.

[ROCHE L.J. Why did you not sue the plaintiff in the county court to recover the amount due for the electricity?]

The undertakers cannot sue for the amount of electricity supplied when the point is taken that the meter is defective, because no electric inspector has been appointed for this district to certify the meter. It was so held by the Divisional

Court in *Hendon Electric Supply Co.* v. *Banks*, (1) That case was wrongly decided.

Evershed K.C. and *W. A. L. Raeburn* for the respondent. There are two issues, (1.) whether the act of the corporation in cutting off the plaintiff's supply of electricity was wrongful, and (2.) whether there ought to be an injunction.

[They were stopped.]

SLESSER L.J. This appeal fails. It is a case which arises out of the action of the East Ham Corporation in cutting off the supply of electricity to a Mr. Harold Joseph, an estate agent, who lives in East Ham, and who had received from them a supply of electricity for domestic purposes. Mr. Harold Joseph, in company with most other consumers of electricity, had in his house what appeared to be an electricity meter, and that meter registered consumption from time to time, and normally this consumption seems to have been—taking the average of the winter and summer months—in the neighbourhood of 500 or 600 units a quarter. It was naturally heavier in the winter months. Thus, in 1933, the March quarter registered 1602 units, but in March, 1934, it registered considerably less. In the June quarter of 1934, the quarter which led to this dispute, the meter registered 2021 units as having been consumed, and Mr. Joseph, as is found by the learned county court judge, without any intention to evade payment for electricity which he believed he had properly consumed, bona fide declined to pay, alleging in a number of letters that the meter must have wrongly registered the amount of electricity consumed. It is not necessary to discuss the correspondence which passed between the parties, except that on it the learned judge has come to the conclusion as a matter of fact that there was between the parties a bona fide dispute, by which I understand him to mean that Mr. Joseph was not, under cover of disputing this amount, attempting to evade his liability to pay what was properly due, but was bona fide disputing the amount which was due.

The local authority are under obligation normally under

(1) (1917) 87 L.J. (K. B.) 790; 118 L. T. 544.

the Electricity Acts to supply electricity to a consumer. By s. 19 of the Electric Lighting Act of 1882 it is provided: "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the licence, order, or special Act authorizing such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply." So we start with this situation, that prima facie Mr. Joseph, as a person in the area, was entitled, having made his application, to a supply of electricity on the same terms as other people. He made application on a printed form which contains the general conditions under which the corporation will supply electricity—the one which has been handed to us is dated July 17, 1931. It contains a number of conditions. In so far as in this case it has not been suggested that those conditions in any way affect the application of the law, which I shall discuss in the course of my judgment, and as no argument has been founded upon the particular conditions in Mr. Joseph's application, or contract, it is not necessary to consider them. Having made that application, and Mr. Joseph being in receipt of a supply, the electricity undertakers, the local authority, on his persistent refusal to pay their demand in respect of these 2021 units, proceeded physically to cut off his supply. Mr. Joseph then with the courage (as Swift J. suggested in the argument) of another Hampden, proceeded to fight this local authority, and, after taking proceedings in the High Court to obtain an interim injunction, proceeded to bring an action in the county court for the purpose of obtaining an injunction to restrain the defendants from disconnecting his supply of electricity. The learned judge has found in favour of Mr. Joseph, the plaintiff, and he has said in his judgment that there must be an injunction restraining the defendants from disconnecting the supply of electricity. The order actually made was: "The Court being of opinion that the act of disconnecting the supply of electric current was wrongful, no order except as to costs: Plaintiff to have High Court costs to remission, Scale B thereafter; liberty to plaintiff to apply for an injunction if so advised." By common consent this case has been treated upon that footing.

The reason why Mr. Joseph says that the local authority acted unlawfully in cutting off his supply may be shortly stated thus. In the first place he admits that in certain circumstances the Electric Lighting (Clauses) Act of 1899, which by a Schedule adds to the Provisional Orders made under the Acts relating to electric lighting, which includes this particular case which we have here to consider, contains provisions as to the conclusiveness of the registration of a meter. Sect. 57 of the Schedule to the Electric Lighting (Clauses) Act, 1899, which is incorporated in the private Act, contains these words: "If any difference arises between any consumer and the undertakers as to whether any meter, whereby the value of the supply is ascertained (whether belonging to the consumer or to the undertakers), is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter, that difference shall be determined upon the application of either party by an electric inspector or, where the local authority are the consumers, by an inspector to be appointed by the Board of Trade, and that inspector shall also order by which of the parties the costs of and incidental to the proceedings before him shall be paid, and the decision of the inspector shall be final and binding on all parties. Subject as aforesaid, the register of the meter shall be conclusive evidence in the absence of fraud of the value of the supply."

Subject to the question of referring the matter to an inspector, Mr. Joseph does not dispute that s. 57 provides that the register of the meter shall be conclusive evidence of the value of the supply, and that if he falls within that section he would have to accept the reading of the register as correct. His first point—a point of considerable public importance—is this: He said he never had installed in his house a meter within the meaning of the Electricity Acts at all. The reason he says that is this: The sections dealing with meters in the Electric Lighting (Clauses) Act, 1899—namely, sections 49 to 53—have been amended and there is substituted for those sections certain other sections of the Second Schedule to the Electric Lighting Act of 1909. It is provided in s. 49 that " the amount of energy supplied by the undertakers to any ordinary consumer under the special order, or the electrical quantity contained in the supply . . . . shall, except as otherwise agreed between the consumer and the undertakers, be ascertained by means of an appropriate meter duly certified under the provisions of the special order." Sect. 50 states the only way in which such a meter can be considered to be duly certified, and the language is as follows: " A meter shall be considered to be duly certified under the provisions of the special order if it be certified by an electric inspector appointed under the special order to be a meter capable of ascertaining the value of the supply within such limits of error as may, as respects meters of the class to which the meter belongs, be allowed by the Board of Trade, and to be of some construction and pattern approved by the Board of Trade, and every such meter is hereinafter referred to as a ' certified meter ' . . . ." Now by operation of a later Act—namely, the Electricity (Supply) Act of 1919, s. 2: " The Board of Trade may exercise through the Electricity Commissioners any of their powers and duties under the Electric Lighting Acts." If we substitute for the Board of Trade in s. 50 of the Second Schedule to the Electric Lighting Act of 1909 the Electricity Commissioners, the result is that the meter must be of some construction and pattern approved by the Electricity Commissioners. But such a meter to be a certified meter has not only to be of such construction and pattern, but it has to be certified by an electric inspector under the special order. Now, the learned judge has found as a fact, and, indeed, it is not disputed, that in the borough of East Ham there never has been appointed any electric inspector. Indeed we are told that with one or two exceptions no electric inspectors have been appointed in any part of

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the United Kingdom. If that be so, the consequences in the administration of this Act may be serious, but I do not accept that statement, which may or may not be correct, but it is sufficient for me to deal with the case of East Ham. In East Ham it is found that there never has been appointed an electric inspector. Sect. 35, sub-s. 1, of the Schedule to the Electric Lighting (Clauses) Act, 1899, provides that " while the local authority are themselves the undertakers " —which is this case—" the Board of Trade " (now the Electricity Commissioners) " on the application of any consumer or of the undertakers, may appoint and keep appointed, one or more competent and impartial person or persons to be electric inspectors under the special order." Then under s. 36, sub-s. 1 : " The duties of an electric inspector under the special order shall be as follows : . . . . (*b*) The certifying and examination of meters." It follows, therefore, that inasmuch as there never has been an electric inspector at all, that there never was within the meaning of the Electricity Acts a certified meter—a statutory meter as I may call it—installed into Mr. Joseph's house. Bearing that in mind, one passes to the rights which the local authority claim in order to have the power to cut off Mr. Joseph's supply of electricity, which under the Act of 1882 they are otherwise bound to furnish. For this purpose two sections are invoked—s. 18 of the Electric Lighting Act, 1909, and s. 21 of the Electric Lighting Act, 1882. If I may take the latter first, the Electric Lighting Act of 1882 provides in s. 21, so far as the material provision is concerned : " If any local authority, company, or person neglect to pay any charge for electricity or any other sum due from them to the undertakers in respect of the supply of electricity to such local authority, company, or person, the undertakers may cut off such supply, and for that purpose may cut or disconnect any electric line or other work through which electricity may be supplied." Now it seems that that was the section under which the local authority purported to act, but the governing words : " If any . . . . person neglect to pay any charge for electricity " can only arise when that sum has been ascertained to be due in accordance with the Acts by a properly certified meter. There being here no properly certified meter, it is not possible, in my opinion, for the local authority to say that there was a sum due to them from Mr. Joseph within the meaning of s. 21. It may be that electricity having been supplied the local authority might ultimately have some right to obtain some sum, but so far as the sum demanded was concerned it was a sum based upon the reading of the meter which Mr. Joseph disputes, and as the meter was not a statutory meter I do not think the local authority falls within s. 21 of the Act of 1882 at all, which is subject to the provisions of s. 57 of the Schedule to the Electric Lighting (Clauses) Act, 1899, which while giving the local authority the advantage of having the register of their meters treated, subject to certain appeals, as being final and conclusive evidence of the value of the supply, also contains a provision for the protection of the public that the meter shall be examined by an impartial person, a provision which the local authority in this case have failed to carry out.

But there is another matter. We have also to have regard to s. 18 of the Act of 1909, which says: "The undertakers may refuse to supply electrical energy to any person whose payments for the supply of electrical energy are for the time being in arrear (not being the subject of a bona fide dispute), whether any such payments be due to the undertakers in respect of a supply to the premises in respect of which such supply is demanded or in respect of other premises." I quite agree with Mr. Croom-Johnson that the ambit of s. 18 of the Act of 1909 is, on the face of it, wider than s. 21 of the Electric Lighting Act of 1882. Although it is wider, it seems to me to cover everything that is effected by s. 21 of the Act of 1882, the only difference being that in one case the language is: "If any . . . . person neglect to pay any charge for electricity or any other sum due from them . . . . the undertakers may cut off such supply," and in the other case they may "refuse to supply." "Refuse to supply" is wider than "cut off." It seems to me to cover both the cases of refusing a supply over an existing cable and the right to refuse new supplies when asked for. The importance of that view that everything in the Act of 1882, s. 21, is covered by s. 18 of the Act of 1909, although other cases are also dealt with in the Act of 1909, is this: It is not only the explanation of the subject-matter which is covered, but also the limitation of the rights by which the undertakers may refuse a supply; for when we reach s. 18 of the Act of 1909 it is only a right to refuse a supply when the payments for the supply of electrical energy are in arrear, where those payments are not the subject of a bona fide dispute. Here it is found as a fact that they were the subject of a bona fide dispute. There was no sum ascertained to be due at all, for in the absence of a statutory meter it was not possible to say what payments were in arrear, if any.

For these reasons and because there is a finding of fact that there was a bona fide dispute, the local authority had no right, in my opinion, to cut off this supply at all. There is even another difficulty in their way. Sect. 57 of the Schedule to the Electric Lighting (Clauses) Act, 1899, which provides that the register of the meter shall be taken to be conclusive evidence as to the value of the supply, contains a proviso. That proviso gives a limited appeal to the electric inspector before the matter goes to the court at all. I mentioned this at an earlier stage of my judgment and I must now deal with it. Sect. 57 of the Schedule to the Electric Lighting (Clauses) Act of 1899 says: "If any difference arises between any consumer and the undertakers as to whether any meter, whereby the value of the supply is ascertained (whether belonging to the consumer or to the undertakers), is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter, that difference shall be determined upon the application of either party by an electric inspector or, where the local authority are the consumers, by an inspector to be appointed by the Board of Trade, and that inspector shall also order by which of the parties the costs of and incidental to the proceedings before him shall be paid, and the decision of the inspector shall be final and binding on all parties." Then follow the words: "Subject as aforesaid, the register of the meter shall be conclusive evidence in the absence of fraud of the value of the supply." In answer to that it is stated by Mr. Croom-Johnson that Mr. Joseph never did apply to have this dispute determined by an electric inspector. To which Mr. Joseph in his turn replied that there never was an inspector to whom he could apply, to which the rejoinder of the local authority is that if Mr. Joseph had liked he could himself have applied under s. 35, sub-s. 1, to the Board of Trade (now to the Electricity Commissioners) as a consumer, for an electric inspector to be appointed. So according to them, if Mr. Joseph had carried out his full rights on this part of the case he would have applied for an electric inspector to be appointed by the Electricity Commissioners, and having got an electric inspector appointed he could then have applied to have his case determined by that official. Speaking for myself I do not base my judgment upon that part of the case. It is that view which appears to have found favour principally with the county court judge. It is possible that the local authority might in the appropriate case argue that under s. 57 it lay upon the person, the complainant, to apply to have the matter heard by an electric inspector, and as s. 35 of the schedule seems to contemplate in terms that the consumer might apply to the inspector, it may be that in an appropriate case the local authority may say, if that had not all been done by the consumer, the reading would have been conclusive. Rather would I decide this case against the local authority on the ground that the register of the meter is to be conclusive, but, as I say, there was no certified meter within the meaning of the statute at all, and therefore nothing registered by the actual meter in Mr. Joseph's house could be regarded as being conclusive evidence of the value of the supply.

This appeal must be dismissed with costs.

ROCHE L.J. I agree that this appeal should be dismissed. Mr. Joseph's meter prior to the time when the matters in question in this proceeding arose, had never registered more than 450 units in a summer quarter or 1600 units in a winter quarter. He was accordingly not unnaturally surprised when he was presented with a reading of 2000 units in the midsummer quarter of 1934, and he both thought and said that the meter had gone wrong in its recording. The local authority, the suppliers of the electricity, while Mr. Joseph was arguing this point, cut off his supply. Mr. Joseph is a responsible person, we are told, as regards money. The result of that was these proceedings. Mr. Joseph succeeded in the proceedings in the Bow county court. From the judgment in his favour the local authority appealed. The learned county court judge was, in my opinion, right in the reasons which he assigned for his judgment. He found that there was in progress a bona fide dispute as to how much payment was due from Mr. Joseph to the local authority. As to that finding he was, in my judgment, abundantly right. If he had found anything else I should have been surprised, and should have thought there was no evidence to justify a contrary finding. It was contended in this Court that there was a greater right under s. 21 of the Electric Lighting Act, 1882, to cut off a supply than there was to refuse a supply under s. 18 of the Electric Lighting Act, 1909; and that a more unlimited right, whether a dispute was in existence or not, to cut off was to be found in s. 21 of the Electric Lighting Act, 1882, than in s. 18 of the Act of 1909. In my judgment to cut off a supply of electricity is a most effective and practical refusal to supply electrical energy, and such cutting off and such refusal to supply thereby manifested is, for the reasons given by my Lord, an infringement of the terms of s. 18 of the Electric Lighting Act, 1909, which permits a refusal where there is not a bona fide dispute, but forbids a refusal of a supply where there is a bona fide dispute. For that reason alone, in my judgment, this appeal fails. But I am also of opinion that it fails for the reasons assigned by my Lord connected with the sections of the Second Schedule to the Act of 1909 dealing with the requirements of a meter. I need not repeat any part of those observations. I only express my entire concurrence with what has been said by my Lord on this point.

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Therefore, for both these reasons, in my judgment this appeal fails and should be dismissed with costs.

SWIFT J. I agree.

Appeal dismissed.

Solicitors for appellants: *Wilson & Blew.*
Solicitors for respondent: *Gulliver & Burrow.*

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ST. PIERRE AND OTHERS *v.* SOUTH AMERICAN STORES (GATH AND CHAVES), LIMITED, AND OTHERS.

[1935. S. 2755.]

Practice—Stay—Action for rent of premises in foreign country—Jurisdiction—Effect of foreign legislation as to payments—Lis alibi pendens—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 41.

The appellants (defendants in the action), two English companies having their head offices in London but carrying on business exclusively in South America, were jointly liable to the respondents (the plaintiffs in the action) for rent in respect of premises occupied by one of them in Chile under a lease drawn in the Spanish language according to Chilean law and executed by all parties in Paris, by which also all parties elected domicil in Chile. The rent stipulated by the lease was 93,500 pesos of 183,057 millionths of a gramme of fine gold monthly, which was to be paid at the option of the lessors either in Chile or remitted to Europe according to their instructions.

Disputes having arisen between the parties in view of Chilean legislation which the appellants contended prevented them remitting the rent from Chile without official authorization by the Chilean Government, which authorization had been refused, the appellants commenced proceedings in Chile, which were still pending, claiming a declaration that the rent could lawfully be paid in notes of the Banco Central de Chile. The respondents having brought the present action in England claiming payment of the rent in sterling equivalent to 183,057 millionths of a gramme

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of fine gold, the appellants applied under s. 41 of the Judicature (Consolidation) Act, 1925, to have it stayed as being vexatious and oppressive. Porter J. refused a stay. On appeal:—

Held, (1.) that the action was a personal action, transitory in its nature, which the English Court could competently entertain notwithstanding that incidentally it related to an immovable out of England; (2.) that the legal effect of the clause in the lease by which all parties elected domicil in Chile could not properly be determined upon affidavits; (3.) that though some inconvenience might be caused to the appellants by having to call evidence as to Chilean law with regard to the mode in which the rent could be paid, this did not amount to an injustice sufficient to entitle the appellants to a stay of the action; and (4.) that the fact that an action by the appellants against the respondents was pending in Chile was not in itself a ground entitling the appellants to a stay.

The Janera [1928] P. 55 and *The London* [1931] P. 14 approved and applied.

Decision of Porter J. affirmed.

Appeal from a decision of Porter J.

The plaintiffs were the personal representatives of one Hector de Beéche, who at all material times was a Chilean subject and was the owner of certain property in Santiago de Chile. The defendants, the South American Stores (Gath & Chaves), Ld., and the Chilean Stores (Gath & Chaves) Ld., were English companies carrying on business exclusively in South America. The Chilean Stores were the tenants of properties in Santiago de Chile under a lease granted by the said Hector de Beéche. The South American Stores, who carried on business in the Argentine, were guarantors of the performance by the Chilean Stores of their obligations under the said lease and undertook jointly with them their obligations. By that lease, which was dated June 17, 1931, and which was drawn up in the Spanish language, according to Chilean law, and executed by all parties before the Chilean consul in Paris, it was provided that the rent should be 93,500 pesos of 183,057 millionths of a gramme of fine gold monthly, to be paid at the option of the lessor either in Chile at his domicil or office, or remitted to Europe, according to his instructions. The lease also provided for payment by the defendants of 15,000*l.* sterling in respect of dilapidations under a previous lease, to be paid as to 7500*l.* on August 31, 1935, and as to the balance of 7500*l.* on August 31, 1945.

In the action the plaintiffs claimed (1.) the above mentioned sum of 7500*l.* as due on August 31, 1935; (2.) the sum of 3858*l.* 18*s.* 9*d.* as rent due on September 2, 1935, being the equivalent at 140/3 per ounce the market price of fine gold on that day of 2337*l.* 10*s.* gold sovereigns, or 93,500 units or weights of 183,057 millionths of a gramme fine gold; (3.) interest till payment or judgment; and (4.) a declaration that the monthly rent payable under the lease was an amount of currency equal to 93,500 units or weights of 183,057 millionths of a gramme of fine gold.

The defendants filed an affidavit in which they contended that the payment claimed in sterling was illegal or impossible by reason of two laws of the Chilean Republic, Nos. 4973 and 5107, under which they said that it had been decided in other proceedings between the same parties (1) that at all material times it was illegal according to Chilean law for the defendants as lessees and guarantors respectively, without the permission of the Control Committee and/or the Exchange Control Commission set up under those laws, to obtain and deliver in Chile bills of exchange drawn in Chile on London for the purpose of satisfying their obligations under the lease. The defendants further said that they had applied for and been refused leave by the Exchange Control Commission in Santiago to make such payment. They had, however, deposited the equivalent sum in pesos in the Chilean Courts. The defendants by their affidavit contended that the effect of the words of the lease as to payment fell to be determined according to Chilean law, that the lease provided that both parties to the lease had elected domicil at Santiago de Chile, and that by virtue of Art. 69 of the Chilean Civil Code any question as to the effect or interpretation of the lease must be submitted to the Tribunal of Santiago to the exclusion of any other Court. Further, they said that the Chilean Stores on August 24, 1935, commenced proceedings in the Chilean Courts claiming a declaration that the rent payable under the lease was properly payable by means of the delivery to the lessors monthly of 93,500 pesos current Chilean money, that was to say, in notes of the Banco Central de Chile, and in each case where the Exchange Commission had refused permission to remit to Europe the equivalent in foreign money of the rent, that sum should be paid in Santiago in current money—i.e., in notes of the Banco Central de Chile.

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(1) See *De Beéche* v. *South American Stores Ld. and Chilian Stores Ld.* [1935] A. C. 148.

In view of those considerations the defendants applied that the action should be stayed either generally or at least until the decision of the Chilean Court was given.

By their affidavit in reply the plaintiffs said that the defendant companies were English companies, each with its head office in London; that the plaintiffs were advised and believed that it was neither illegal nor impossible by reason of the laws referred to for the payments claimed by the plaintiffs to be made by the defendants; that although the lease fell to be construed according to Chilean law there was no difficulty in having that decided in the English Courts; that the election of domicil in the lease was merely for the validity of the contract in Chile; that the proceedings commenced by the defendants against the plaintiffs in Chile had not been commenced before there was a lis pendens in England and therefore by Chilean law the Chilean proceedings were irregular and should not have been commenced; that the English Courts were more accessible to the deponent (who lived in Paris) than the Chilean Courts, and moreover were the Courts within whose jurisdiction the defendant companies were. For these reasons it was submitted that the action should not be stayed.

Porter J. dismissed the defendants' application to stay the action.

The defendants appealed.

Evershed K.C. and *Harold Murphy* for the appellants. First, the action brought against the appellants relates to land in Chile, or is analogous to such an action; it is thus a local and not a transitory action within the definition of those terms given by Lord Herschell L.C. in *British South Africa Co.* v. *Companhia de Moçambique.* (1) An English

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(1) [1893] A. C. 602.

Court therefore has no jurisdiction to entertain it: see Dicey's Conflict of Laws, 5th ed., Rule 53, pp. 203, 207; White & Tudor's Leading Cases in Equity, 9th ed., vol. i., pp. 643 et seq.

Secondly, the English Court is not a forum conveniens. The contract not only relates to land in Chile, it was drawn up in the Spanish language, and was entered into in France between Chilean subjects and a company which has all its business activities in Chile, so that there are good grounds for our contention in favour of the convenience of trying the dispute in Chile. It can be no hardship on a Chilean subject to be told that he ought to go to his own Court to have the matter decided. In *Logan* v. *Bank of Scotland* (*No.* 2) (1) it was laid down that the Court will stay an action in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will thereby be done to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if the action were brought in another and accessible Court.

Thirdly, the question in dispute is pending in the Chilean Courts in an action at the instance of the appellants against the respondents, and it was laid down in *McHenry* v. *Lewis* (2) that the English Court has in such circumstances power to interfere under its general jurisdiction to restrain vexatious and oppressive litigation. In *The Janera* (3) Hill J. said that "the Court ought not to stay a plaintiff in the Courts of this country on the ground that he happens to be a defendant elsewhere. . . . . I cannot think that I ought to stay a proceeding properly brought in this country solely because the people who have brought that action are defendants in proceedings in Egypt." Here we say that this action was not properly brought in this country, and moreover there is a special reason why the matter should be decided in Chile rather than here—namely, because the question involved depends entirely on Chilean law.

Lastly, we rely on the clause in the contract by which the parties elected a Chilean domicil. That fact entitles the appellants to a stay: *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society.* (1)

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(1) [1906] 1 K. B. 141.

(2) (1882) 22 Ch. D. 397.

(3) [1928] P. 55, 57.

A. T. Miller K.C. and *Ernest Hancock* for the respondents. The case sought to be made for the appellants is that the proceedings instituted in this country are vexatious and oppressive and therefore ought to be stayed. Vexation and oppression must be established, and have not been shown in this case. As Sir Gorell Barnes said in *Logan* v. *Bank of Scotland* (*No.* 2) (2): "In my opinion, however, the jurisdiction of the Court to stay proceedings on the ground of vexation should be exercised with great care. . . . . The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the Courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused." Here the defendants are English corporations with their head offices and officials in this country. The statement of the law just quoted from Sir Gorell Barnes was supplemented by Vaughan Williams L.J. in *In re Norton's Settlement* (3), where he said: "I think that it is a true proposition that the mere fact of increased expense of trial in England is not of itself a sufficient reason for granting a stay. I wish to say, further, that the undoubted inherent jurisdiction of the Court to stay proceedings on the ground that they are an abuse of the process of the Court should always be exercised with the greatest care and caution."

[GREER L.J. It is said that the English Courts have no jurisdiction to deal with the matter.]

This is not, as is suggested for the appellants, an action relating to land or the title to land or its possession in Chile. The action is brought to recover money due under the contract; the fact that it is due for rent is merely incidental. It is not correct, therefore, to say that the English Courts have no jurisdiction to deal with the question. As to the suggestion that to bring the action here will cause increased expense to the appellants, a similar plea was rejected as insufficient in *In re Norton's Settlement.* (1)

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(1) [1903] 1 K. B. 249.

(2) [1906] 1 K. B. 141, 150.

(3) [1908] 1 Ch. 471, 479.

The appellants' further contention that the proceedings here may prevent them paying money into Court in Chile cannot affect our right to sue here. As to the argument based upon the fact that an action by the appellants against the respondents is pending in Chile, it was held by Hill J. in *The Janera* (2) and by Langton J. in *The London* (3) that a plaintiff's action will not be stayed in the Courts of this country, as being prima facie vexatious, merely because the plaintiff is defendant in an action commenced in another country in respect of the same subject-matter. See also the judgment of Bowen L.J. in *Thornton* v. *Thornton.* (4) The point sought to be made that the parties have by the terms of the lease agreed to submit themselves to the jurisdiction of the Chilean Courts, has not been established, nor, even if it had been established by the affidavits, could it be said to show vexatious conduct on the part of the respondents in prosecuting their claim here.

Evershed K.C. in reply. In *In re Norton's Settlement* (5) Farwell L.J. said in the course of the argument: "How is the question of domicil material? The contract was made in India, and the property and the witnesses are in India. The onus is on the plaintiff to rebut the presumption of an Indian forum." That observation applies here a fortiori in view of the fact that the parties specifically elected domicil in Chile. *In re Schintz, Schintz* v. *Warr* (6) was also referred to.

Cur. adv. vult.

Dec. 20. The following judgments were read :—

Greer L.J. This is an appeal by the two defendants against the refusal of Porter J. to stay an action brought in the King's Bench Division to recover an agreed sum of 7500*l.*

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(1) [1908] 1 Ch. 471.
(2) [1928] P. 55, 57.
(3) [1931] P. 14.
(4) (1886) 11 P. D. 176.
(5) [1908] 1 Ch. 471, 476.
(6) [1926] Ch. 710.

and one month's rent of certain premises in the occupation of the defendants, the Chilean Stores, in Santiago de Chile. Both of the claims arose under an agreement made in Paris in the Spanish language between the late Mr. Beéche, whose representatives the plaintiffs are, and the two defendant companies. The defendants are British companies with their head offices in London, but the business of the second defendants is entirely carried on in Santiago de Chile, and of the first defendants in the Argentine. It was stated in the agreement that the defendant company, the South American Stores, guaranteed to hold itself responsible for, and undertook, jointly with the Chilean Stores, strict fulfilment of all the obligations in respect of payment and other conditions and liabilities which the contract of lease imposed on the lessee, for which purpose both parties elected domicil at Santiago de Chile, as would be proved at the end thereof. By art. 1 Mr. Beéche granted on lease to the Chilean Stores for the period of ten years certain premises at Santiago de Chile, the consideration of the lease being stated as follows: "The consideration for the lease is ninety-three thousand five hundred pesos of one hundred and eighty-three thousand and fifty-seven millionths of a gramme of fine gold monthly which shall be paid at the option of the owner either in Santiago de Chile at the residence or office of the latter or of his representatives or remitted to Europe, according to the instructions which the owner may give, one month in advance on the first working day of each month." The agreement went on to provide that in the event of the said payment not being made punctually penal interest at the rate of one per cent. per month should be paid. The said agreement also, by art. 4, referred to an indemnity which had been agreed at 15,000*l.* sterling in respect of alterations already effected in the premises and specified in an earlier contract, and payable in lieu of the restoration of the buildings to the state in which they were before the said alterations were made, and provided that this sum of 15,000*l.* should be paid in two parts, 7500*l.* sterling on August 31, 1935, and the other half on August 31, 1945. It will be observed that, though this article of the agreement is in the same document as the contract of lease, it is not really part of the lease, nor in my judgment is it included in the words as to election of domicil at Santiago de Chile. The late Mr. Beéche lived in Paris, and the agreement with these two British companies was made in Paris in the Spanish language, which is the language of Chile, and it was agreed by the respondents for the purposes of this appeal, and I think rightly agreed, that the proper law of the contract was the law of Chile.

It was argued on behalf of the appellants that they were entitled under s. 41 of the Judicature Act, 1925, to ask that the action should be stayed on the ground that it was either vexatious or oppressive to them to permit the action to proceed in England. Several reasons were suggested why we should regard the action as oppressive: (1.) that, the action being one which was not of a transitory character, the Court in England would according to English law have no jurisdiction to decide it; (2.) it was said that, even if the Court has jurisdiction, it still ought not to entertain the action, because to do so would involve inconvenience to the defendants amounting to injustice; (3.) it was said that the action ought to be stayed on the ground of lis alibi pendens; and (4.) that, by reason of the selection of the domicil of Santiago de Chile, the plaintiffs and the defendants must be taken to have agreed to the exclusive jurisdiction of the Chilean Courts.

Mr. Evershed for the appellants called attention to the law as stated in Dicey's Conflict of Laws, 5th ed., Rule 53, and the exception stated on p. 207, where the learned author says: "Where the Court has jurisdiction to entertain an action against a person under either Rule 59, or under any of the Exceptions to Rule 60, the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either—(*a*) a contract between the parties to the action; or (*b*) an equity between such parties; with reference to such immovable." Mr. Evershed did not dispute, and could not dispute, the accuracy of this statement of the law.

It is quite clear that in the present case there was a personal action on what in England would have been an action on a covenant in a lease for rent. This is not, in my opinion, a real action but is a personal action, and according to Dicey it is one which a Court would have jurisdiction to entertain though the action in personam incidentally relates to an immovable situate out of England. There is in the present case no issue in the action relating to the land in Chile, inasmuch as there is no dispute that the rent had at the date of the writ become due under the terms of the agreement, and on the authorities it seems to me that, unless some injustice would be done to the defendants by allowing the action to proceed in England, it ought not to be stayed. The law on this subject was considered in a number of cases, especially in *Logan* v. *Bank of Scotland* (*No.* 2) (1) and *In re Norton's Settlement.* (2) The decision in *Logan* v. *Bank of Scotland* (No. 2) (1) is accurately summed up in the headnote, which reads as follows : " The Court will stay an action, brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if an action were brought, in another and accessible Court, where the cause of action arose." There the President, who delivered the judgment of the Court, uses these words (3) : " The defendants make this motion practically upon the grounds stated in Sir George Anderson's affidavit, where he urges that no legitimate advantage can accrue to the plaintiff from prosecuting this action in England while there is an appropriate tribunal in Scotland, and that he believes that the plaintiff has not brought the action in England bona fide for the purpose of obtaining justice, but vexatiously and solely for the purpose of harassing the defendant bank." Referring to the Scottish cases the President says (4) : " I should gather that the Scottish

(1) [1906] 1 K. B. 141.
(2) [1908] 1 Ch. 471.
(3) [1906] 1 K. B. 147.
(4) Ibid. 149.

Courts would scarcely object to allow a case to be tried unless they felt satisfied that injustice would be done by allowing it to proceed in their own Court." And at the bottom of the same page he states the principle as being: "That the Court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice." The learned President then cites the judgment of Bowen L.J. in *McHenry* v. *Lewis* (1), where that learned judge said (2): "The general principle [is] that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end"; and the President later says (3): "The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court." In *In re Norton's Settlement* (4) the principle on which a stay should be granted was also considered by the Court of Appeal in an action which had been brought in England by a wife against her husband, a barrister practising in Calcutta, by serving him during his temporary presence in England. The Court having come to the conclusion that the plaintiff had brought the action in England instead of in India, not for any bona fide purpose, but in order to obtain an undue advantage over the defendant, and that the continuance of the proceedings in England would necessarily be productive of injustice to the defendant, stayed the action. It is clear from the decision that the learned Lords Justices came to the conclusion that it was practically impossible in that case for the litigant who was applying for the stay to get justice in this country.

If this test is, as I think it is, rightly applicable to an

(1) 22 Ch. D. 397.

(2) Ibid. 408.

(3) [1906] 1 K. B. 150.

(4) [1908] 1 Ch. 471.

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application to stay a plaintiff's action in this country, I think the defendants, who are English companies, have failed to satisfy the Court that they would suffer any injustice by reason of the action being tried in England. It is clear from the affidavits that the only real question in the case so far as it concerns the claim for rent relates to the amount of the rent payable under the terms of the lease. It seems to me that this can be justly determined by the English Court upon evidence that both sides will be entitled to adduce as to what the law of Chile is as regards the interpretation to be put on the agreement of lease. Both parties will be to some extent inconvenienced by calling evidence in England, but this inconvenience will not, I think, amount to an injustice to the two English companies. These considerations dispose of points (1.) and (2.) of the appellants' argument.

As regards the question of lis alibi pendens, there are many cases to be found in the reports in which a plaintiff bringing an action here and also in a foreign country has been put to his election as to which he will proceed with, but even in such cases there may be advantages to the plaintiff in continuing both actions which will be recognized as entitling him to do so; but there has been no case in which an action of a plaintiff has been stayed on the ground that his defendant has brought the action in a foreign country, and the decisions of Hill J. in *The Janera* (1) and of Langton J. in *The London* (2) are authorities for the proposition that in such a case the plaintiff's action ought not to be stayed.

The fourth ground on which it is alleged that the action should be stayed is that it is contended that the effect of the agreement is to give exclusive jurisdiction to the Courts in Chile. This is a matter that cannot be determined upon affidavits. It might, of course, be set down as a preliminary question of law, but it seems to me that it will be more convenient that it be treated as one of the matters which will fall to be determined when the action comes on for trial.

In my judgment, therefore, this is an action in personam in its nature transitory, and though the judgment if given may

(1) [1928] P. 55.

(2) [1931] P. 14.

affect the defendants' right to continue in possession of the property if they do not pay the rent, this is a matter which will only arise after judgment, but there is no risk of any injustice to the defendants in allowing the action to proceed in England, and we therefore ought not to reverse the decision of Porter J.

The appeal should, therefore, be dismissed with costs, to be paid by the appellants in any event.

Slesser L.J. I have read the judgments of Greer and Scott L.JJ.; I agree with them, and I have nothing to add.

Scott L.J. The facts have been stated fully by Greer L.J., and it is not necessary for me to do more than recite those which constitute the foundation of my own judgment. Two actions are pending at the same time, one in England, the other in Chile; which was brought first is in this case immaterial. The defendants in the English action (appellants in this Court) are the plaintiffs in Chile, and in their action in Chile they seek a declaration against the defendants there, their lessors (the respondents in the appeal before us), that they are entitled by the law of Chile (which it is agreed is the proper law of the contract of lease) to perform their covenant to pay the rent reserved by means of a payment in Chile in Chilean currency. The respondents as plaintiffs here seek a different declaration —namely, that the rent is payable in certain weight units of fine gold either in Chile or, at the plaintiffs' option, in Europe in accordance with their instructions, that is, in such form as the lessors may direct, for example, by bill on London. It is admitted by the appellants, the lessees, that this option was in fact duly exercised by a demand by the respondents that the appellants should remit to the respondents in Paris. The respondents here also claim payment of the rent (calculated to amount to 3858*l.* 18*s.* 9*d.* when measured in sterling) together with contract interest, and in addition a lump sum of 7500*l.* due to them on August 31, 1935, according to a particular covenant in the lease.

The appellants by their affidavits rely on two Chilean laws, Nos. 4973 and 5107. These two laws have already been considered by this Court and the House of Lords in litigation which took place in England in the years 1933 to 1935 between the same parties. (1) They are printed at pp. 69 and 73 respectively of the Black Book in the House of Lords' appeal. The appellants say that by these enactments payment of the rent in accordance with the respondents' requirement under their option, and also of the 7500*l.*, has been rendered illegal under the law of Chile and also impossible in fact. For the reasons given by Greer L.J. on pp. 54 et seq. of the Black Book these pleas must be treated as established, at least so far as this appeal is concerned.

The appellants as defendants ask for an order under s. 41 of the Judicature (Consolidation) Act, 1925, and, if it be necessary for their case, submit that under that section it is a matter of right and not merely of discretion that a stay should be granted where the circumstances contemplated by the section exist. They base their argument on two quite separate grounds: their first is that the English High Court has no jurisdiction because the plaintiffs' action relates to land situate in Chile. Their second ground, alternative to the first, is that the English High Court is not a forum conveniens; and they make the further submission (if mere considerations of convenience, however strong, do not justify a stay) that the action is, in the circumstances of the case, vexatious and oppressive and an abuse of the process of the Court. Neither their summons nor their notice of appeal to this Court indicates any ground for the argument of oppression beyond the fact that litigation is pending before the Courts in Chile in which the matters raised in the English action are in process of determination in accordance with the law of Chile, by which alone the issues between the parties have to be determined. But the argument before us covered a wider field, and I assume, without deciding, for the purpose of this judgment, that it would be wrong to limit the reasons for the decision of the case to the precise grounds stated in the summons.

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(1) See *De Beéche* v. *South American Stores, Ld. and Chilian Stores, Ld.* [1935] A. C. 148

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The appellants' first ground is a plea in bar. The Court either has or has not jurisdiction. No question of discretion enters in. In my opinion the appellants fail on this ground. The action is not one "relating to land" within *British South Africa Co.* v. *Companhia de Moçambique* (1) and Dicey's Conflict of Laws, Rule 53, 5th ed., p. 203. The inhibition of that Rule does not bar the jurisdiction of an English Court except where the action raises one or other of the two issues to which the Rule relates—namely, (1.) the title to, or right to possession of, land in a foreign country; or (2.) damages for trespass to such land. Before the Judicature Acts, where the action was brought on a covenant in a lease a common law Court having jurisdiction over an action founded on such a contract was not deprived of jurisdiction merely because the covenant was to pay rent for land or because the contract as a whole had to do with land. Courts of equity took a similar view. Where the relief asked for could be given by enforcing a personal obligation arising out of express or implied contract, so as to raise an equity, the Court did not hesitate to entertain jurisdiction: see *Deschamps* v. *Miller* (2), per Parker J., and other cases cited in White & Tudor's Leading Cases in Equity, 9th ed., vol. I., pp. 645 et seq.

In *Whitaker* v. *Forbes* (3) a question arose whether the plaintiff could recover against a defendant resident in this country the arrears of a rent charge issuing out of lands in Australia. In that case Blackburn J. said (4): "I do not think this case raises any question as to jurisdiction, though in some respects it has been argued as if it did. The case turns on the technical distinction between local actions, where the trial must be local, and transitory actions, and the question is one of venue only." It is true that Lord Herschell in *British South Africa Co.* v. *Companhia de Moçambique* (5) expressly abstained from expressing an opinion on the above observations of Blackburn J., but he had already said: (6) "It is quite true that in the exercise of the undoubted jurisdiction of the Courts

(1) [1893] A. C. 602.
(2) [1908] 1 Ch. 856, 863.
(3) (1875) L. R. 10 C. P. 583; 1 C. P. D. 51.
(4) 1 C. P. D. 53.
(5) [1893] A. C. 602, 627.
(6) Ibid. 626.

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it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the Courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands." By these words I understand him to have meant that it is the action *founded on* a disputed claim of title to foreign lands over which an English Court has no jurisdiction, and that where no question of title arises, or only arises as a collateral incident of the trial of other issues, there is nothing to exclude the jurisdiction.

In the present case I cannot see that the question of title to or right to possession of the land in Chile is raised even incidentally by any defence to the respondents' claim which is set up in the appellants' affidavits. This being so, I do not think it necessary to discuss the numerous authorities on this first question which were cited to us in the course of the argument. The rule is, I think, so far as the facts here are concerned, correctly formulated by the late Professor Dicey in his Rule 53; and there is nothing there to exclude the jurisdiction of the English High Court in the present case.

Mr. Evershed, as an alternative justification for an order staying the English action, contended, in the words of his summons, that the action is in the circumstances disclosed in the appellants' affidavits "vexatious, oppressive and an abuse of the process of the Court." I agree with the assumption that these are conditions to the grant of a stay, but his evidence, in my opinion, falls short of what is necessary. He gave, it is true, several strong reasons for contending that the Chilean Court is a more convenient forum: (1.) the contract is in Spanish; (2.) the law of the contract is Chilean as to both interpretation and performance; (3.) the action is about land in Chile; (4.) the respondent companies, though registered in England, carry on all their business in Chile; and (5.) Chilean lawyers are so scarce in England that expert evidence for the Court here will be difficult to obtain. But these grounds go only to convenience ; they do not come near to establishing the allegations of the summons. He sought to rely on the considerations summed up in the phrase lis alibi pendens, which have in some cases led to a party, who is plaintiff both here and in another jurisdiction in actions against the same defendant and on the same disputes, being put to his election. But here the respondents are not plaintiffs in the Chile action ; they are defendants and the appellants are the plaintiffs. In such a case the mere fact that the other action is pending raises no presumption to the effect suggested.

The true rule about a stay under s. 41, so far as relevant to this case, may I think be stated thus : (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative : (*a*) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way ; and (*b*) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. These propositions are, I think, consistent with and supported by the following cases : *McHenry* v. *Lewis* (1) ; *Peruvian Guano Co.* v. *Bockwoldt* (2) ; *Hyman* v. *Helm* (3) ; *Thornton* v. *Thornton* (4) ; and *Logan* v. *Bank of Scotland* (*No.* 2). (5)

I do not think that the cases upon service out of the jurisdiction, some of which were cited to us, are sufficiently germane to the principles upon which this appeal turns to call for discussion. Discretion looms larger in that exercise of statutory jurisdiction ; under s. 41 there is little, if any, room for discretion ; decisions on questions of degree often look like, but are not instances of, discretion.

(1) 22 Ch. D. 397.
(2) (1883) 23 Ch. D. 225.
(3) (1883) 24 Ch. D. 531.
(4) 11 P. D. 176.
(5) [1906] 1 K. B. 141, 150, 151.

The decision of the learned judge in the present case is clearly appealable; none the less I am satisfied it was right. I agree that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Mckenna & Co.*
Solicitors for respondents: *Smiles & Co.*

J. S. H.

JARVIS *v.* MOY, DAVIES, SMITH, VANDERVELL AND COMPANY.

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[1934. J. 2338.]

Costs—Action whether founded on contract or on tort—Claim against stockbrokers for breach of instructions—Loss suffered by client—County Courts Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *s.* 11.

The plaintiff sued the defendants, a firm of stockbrokers, claiming damages for breach of his instructions as to the purchase of certain shares whereby he sustained loss. At the trial judgment was given in his favour for 60*l.* and costs:—

Held, that the action was founded on contract, and not on tort, and therefore, by s. 11 of the County Courts Act, 1919, the plaintiff was only entitled to costs on the county court scale.

Boorman v. *Brown* (1842) 3 Q. B. 511; (1844) 11 Cl. & F. 1 considered and held not applicable.

Per Greer L.J.: Where the breach of duty complained of arises out of the obligations undertaken by a contract, the action is founded on contract; but where that which is complained of arises out of a liability independently of the personal obligation undertaken by a contract, an action brought in respect of this is founded on tort, and this is so even though there may be a contract between the parties.

Per Slesser L.J.: A stockbroker does not exercise a "public calling" in the sense in which that term is used as applied to carriers and certain others.

Decision of Greaves-Lord J. affirmed.

Appeal from an order of Greaves-Lord J. dismissing an application for a review of taxation.

The plaintiff sued the defendants, who were stockbrokers, his claim on the writ being in these terms: "The plaintiff's claim is for damages for breach of contract arising out of

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the defendants' relationship with the plaintiff as stockbrokers and client." By his statement of claim the plaintiff alleged, so far as material for this report: Para. 5: "In or about the month of March 1931 the defendants sold 1000 Canadian Pacific shares on behalf of the plaintiff for future delivery and at all material times the plaintiff was paying a high rate of backwardation for deferring delivery of the said 1000 Canadian Pacific shares from account day to account day upon the London Stock Exchange." Para. 6: "On or about March 25, 1931, the plaintiff instructed the defendants by cable to buy 300 Canadian Pacific shares at not more than $43 for delivery against the Canadian Pacific shares sold as is set out in para. 5 hereof, unless it was possible to obtain backwardation facilities at a cheaper rate than formerly." Para. 7: "It was the duty of the defendants in the premises to wait until the next contango day upon the London Stock Exchange (which was April 6, 1931) before taking any steps to execute the plaintiff's instructions, but in breach of their said duty and in breach of the said instructions the defendants bought 300 Canadian Pacific shares at $43 on or about March 27, 1931." Para. 8: "By April 6, 1931, which was settlement day upon the London Stock Exchange, the market price of Canadian Pacific shares had fallen lower than $43 and it would have been possible to buy Canadian Pacific shares at $41 on or before April 6 aforesaid." Para. 9: "By reason of the premises the plaintiff lost the sum of $600, being the difference between 300 Canadian Pacific shares at $43 and 300 Canadian Pacific shares at $41." The plaintiff accordingly claimed 123*l.* 8*s.* 6*d.*, being the sterling equivalent of $600 at the material date.

The defendants denied that they had been guilty of any negligence or breach of duty towards the plaintiff, and said that they "being of opinion that cheaper rates could not be obtained (which was the fact) purchased 300 Canadian Pacific shares for the plaintiff as soon as the limit of $43 was reached."

At the trial Horridge J. gave judgment in favour of the plaintiff for 60*l.* on the above-mentioned claim with costs, and judgment for the defendants on another issue with costs. He added that the action could have been brought in the county court for breach of duty.

The Taxing Master having taxed the plaintiff's costs on the county court scale, the plaintiff carried in objections contending that the cause of action in respect of which he recovered 60*l.* was founded on tort and not on contract. In his answer the Taxing Master said that there was a contract between the parties, and that it was by reason of that contract that they came into relationship with each other. The plaintiff complained that the defendants did not carry out his instructions. Those instructions could only be given by virtue of the contract existing between them, and consequently he (the Taxing Master) held that the non-fulfilment of these instructions gave rise to a claim "founded on contract," with the result that the plaintiff was entitled to no more costs than those to which he would have been entitled if the action had been brought in the county court.

On appeal for a review of the taxation Greaves-Lord J. affirmed the ruling of the Taxing Master.

The plaintiff appealed.

Picciotto for the appellant. It is submitted that the Taxing Master and Greaves-Lord J. were wrong in holding that the cause of action in respect of which the appellant recovered 60*l.* was founded on contract. The action was founded on tort, and therefore by virtue of s. 11 of the County Courts Act, 1919 (1), he was entitled to High Court costs.

The ground of the claim is for breach of duty in the course

(1) County Courts Act, 1919, s. 11: "Where an action is brought in the High Court which could have been commenced in a county court, then, if the plaintiff recovers a sum less, in the case of an action founded on a contract, than forty pounds, or in the case of an action founded on tort than ten pounds, he shall not be entitled to any costs of the action, and if he recovers, in the case of an action founded on contract a sum of forty pounds or upwards but less than one hundred pounds, or in the case of an action founded on tort a sum of ten pounds or upwards but less than fifty pounds, he shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in a county court. . . ."

of carrying out instructions given to the respondents as stockbrokers, and is, within the decision of the Exchequer Chamber in *Boorman* v. *Brown* (1), an action of tort. In that case the plaintiffs instructed the defendant, an oil broker, to sell linseed oil on their behalf to be paid for in ready money. The defendant sold the oil without being paid, and the purchaser having become bankrupt the plaintiffs lost the oil and the price, whereupon they sued the defendant to recover damages. Tindal C.J. said (2) that "the principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort." That decision was affirmed in the House of Lords (3), where Lord Campbell said (4): "I think that the judgment of the Court of Exchequer Chamber is right, for you cannot confine the right of recovery merely to those cases where there is an employment without any special contract. But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract. It is impossible to say that the whole of this is not connected with the duty of the defendant as a broker in this case." That language applies to this case. In *Steljes* v. *Ingram* (5) Phillimore J. treated the decision in *Boorman* v. *Brown* (6) as having added the profession of a broker to the list of "callings," such as those of surgeons and solicitors, in which a duty, independently of contract, is owed to those employing them; and he pointed out that "there were some cases in which, though the original relation between the parties was produced by a contract, this relation, once established, might be regarded as creating a further relation of *status* in which the parties would have duties to each other; and that the breach of these duties might be treated as a tort and sued for in tort, although the original relation arose out of contract."

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(1) 3 Q. B. 511.

(2) Ibid. 526.

(3) (1844) 11 Cl. & F. 1 (nom. *Brown* v. *Boorman*).

(4) Ibid. 44.

(5) (1903) 19 Times L. R. 534.

(6) 3 Q. B. 511; 11 Cl. & F. 1.

Again, in *Sachs* v. *Henderson* (1), Collins M.R. said (2) that "where it is only necessary to refer to the contract to establish a relationship between the parties, and the claim goes on to aver a breach of duty arising out of that relationship, the action is one of tort"; see also Bullen and Leake's Precedents (3rd ed.), pp. 273, 274; *Legge* v. *Tucker* (3), where Pollock C.B. said that "where there is a duty ultra the contract, the plaintiff may declare in case"; and *Baylis* v. *Lintott.* (4) In *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (5) an action by a passenger against a railway company for injuries caused to him by the negligence or misfeasance of their servant, was held to be founded on tort and not upon contract, even though the passenger had taken a ticket.

[*Bryant* v. *Herbert* (6) and *Fleming* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (7) were also referred to.]

Astell Burt for the respondents was not called upon.

GREER L.J. In this appeal the appellant, the plaintiff in the action, complains that having recovered the sum of 60*l.* he has only been allowed costs on the county court scale, the Taxing Master and the judge, affirming him, holding that on the true interpretation of s. 11 of the County Courts Act, 1919, the costs were taxable on the scale applicable to actions for breach of contract, and not, as the appellant contends, on the scale applicable to an action founded on tort. A large number of cases have been cited to us. The question for our determination, however, is not whether, before the Common Law Procedure Act, and before the provisions as to costs in the County Court Acts, the appellant might have been right in his contention, but what effect is to be given to the statutory provisions now in force. No doubt at one time the classification adopted by the Legislature would not have accorded with the rules as to forms of action described as actions in assumpsit and actions on the case. While I have listened with interest to Mr. Picciotto's argument

(1) [1902] 1 K. B. 612.
(2) Ibid. 616.
(3) (1856) 1 H. & N. 500, 502.
(4) (1873) L. R. 8 C. P. 345, 349.
(5) [1895] 1 Q. B. 134.
(6) (1878) 3 C. P. D. 389.
(7) (1878) 4 Q. B. D. 81.

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and have considered the cases he cited, I cannot, having regard to *Legge* v. *Tucker* (1); *Fleming* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2); and *Steljes* v. *Ingram* (3), escape the conclusion that we must look not merely at the form of the pleadings but at the substance of the matter, and if in substance the action is founded upon a breach of contract, the costs must be dealt with on that footing. Where, however, to take a familiar case, a plaintiff says, for example, that he was lawfully on a railway company's premises and while there was injured through the negligence of the company's servants, an action brought by him in respect of his injuries would be founded on tort although as part of the history it might be necessary for him to show that on entering the company's premises he had taken a ticket. But there may be cases where a person may lawfully be on a railway company's premises although he had not himself taken a ticket.

The present action is against stockbrokers claiming damages for loss arising out of the relationship of stockbrokers and client. The appellant says that he employed the respondents as his stockbrokers to buy Canadian Pacific shares on his behalf and from time to time to carry them over. Later, getting tired of paying the charges thereby incurred, he wanted the transaction closed, so far as 300 shares were concerned, by the purchase on the market of 300 Canadian Pacifics at not more than $43 "unless it was possible to obtain backwardation facilities at a cheaper rate than formerly." The plaintiff alleged that it was the respondents' duty to wait until the next contango day upon the London Stock Exchange before taking any steps to execute these instructions, and he says that in breach of their duty they bought 300 Canadian Pacific shares at $43. Accordingly he brought this action in respect of the loss occasioned to him by the premature exercise by the respondents of their mandate as brokers. In my judgment it is impossible to regard that, either in form or in substance, as other than an action for breach of contract. The respondents were employed by the

(1) 1 H. & N. 500.
(2) [1878] 4 Q. B. D. 81.
(3) 19 Times L. R. 534.

appellant under the contract made between the appellant as client and the respondents as stockbrokers; their duties were regulated by the contract; and it is only by proving that a term of the contract was broken that any cause of action can be established. We were pressed by Mr. Picciotto with the decision in *Boorman* v. *Brown* (1), but whatever may be the true inference to be drawn from that case it has no bearing on the interpretation of the statute we have to consider. I say so because of the language that has been used time and again in later cases, especially in *Fleming* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) and *Steljes* v. *Ingram.* (3) It does not follow, however, from what I have said that there may not be cases such as *Sachs* v. *Henderson* (4) where, in order to found a case in tort, it may be essential as part of the history to allege that it commenced by a contract.

The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract.

For these reasons this action must be treated as one for damages for breach of contract; the 60*l.* was awarded for breach of contract; and the Taxing Master and the judge were right in deciding that the costs were taxable on the county court scale. The appeal must therefore be dismissed.

SLESSER L.J. I am of the same opinion. The question is whether under s. 11 of the County Courts Act, 1919, this action is founded on contract or on tort. The views which the Courts have expressed upon this problem have undergone a change, occasioned chiefly, I think, by the passing of the

(1) 3 Q. B. 511.
(2) 4 Q. B. D. 81.
(3) 19 Times L. R. 534.
(4) [1902] 1 K. B. 612.

Common Law Procedure Act, 1852, which abolished the former strict compliance with the forms of pleading. Historically no doubt the action of contract developed out of the writ of assumpsit, which again was developed out of the writ of trespass on the case. By reason of these forms of action difficulties arose. In *Brown* v. *Boorman* (1) Lord Campbell said : " But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract." If that view is to be taken without qualification it would follow that every action for breach of duty which developed from a contract could be brought in tort ; but as I understand the later cases, we have now to look at the substance of the transaction. Although I do not agree with what Bramwell L.J. said in *Bryant* v. *Herbert* (2) that in approaching such a question all the old learning is to be regarded as " useless, and worse than useless," I agree that it has to be kept in its proper place. Looking therefore at the substance of the matter, I think this is clearly an action founded on contract. In the first place the appellant by the indorsement on the writ says that the "claim is for damages for breach of contract arising out of the defendants' relationship with the plaintiff as stockbrokers and client," and although it is true that a plaintiff is not limited to the exact cause of action stated on the writ, yet the indorsement may be looked at together with the statement of claim to see whether the latter extends that which appears on the writ. I can find no such indication in this case. A considerable part of the statement of claim, that based on the relationship of stockbrokers and client, is founded exclusively on contract. Paras. 5 to 7 set out the steps which were to be carried out by the respondents and their alleged breach of those instructions, all this arising out of the personal relationship between the parties as fixed by themselves.

In reference to the suggestion that a broker might be regarded as exercising a common calling in the same way as,

(1) 11 Cl. & F. 1, 44.

(2) 3 C. P. D. 389, 392.

for example, a carrier, in respect of whom it has been held that his duties to the public are imported so that a breach of these is necessarily a tort, I desire to add that no authority was cited to establish that a stockbroker is in such a position. In *Steljes* v. *Ingram* (1) Phillimore J. referred to the judgment in *Boorman* v. *Brown* (2) (which on this point he was careful to say was neither affirmed nor disaffirmed in the House of Lords) as dealing with a broker but one of a class of brokers subject to regulations by statute. Such a broker cannot be deemed to include the business of a stockbroker. In my opinion a stockbroker does not exercise a "public calling" in the sense in which that term is used as applied to carriers and certain other occupations. In this case a personal relationship existed between the parties, and in my view the breach complained of was a breach of contract. It is thus an action founded on contract and not on tort within s. 11 of the County Courts Act, 1919. The appeal therefore fails.

SCOTT L.J. I agree and have nothing to add.

Appeal dismissed.

Solicitors for appellant: *Mills, Lockyer, Church & Evill.*
Solicitors for respondents: *Wedlake, Letts & Birds.*

J. S. H.

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(1) 19 Times L. R. 534.

(2) 3 Q. B. 511.

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Feb. 12, 13.

LOCKER AND WOOLF, LIMITED *v.* WESTERN AUSTRALIAN INSURANCE COMPANY, LIMITED.

Insurance—Fire—Proposal—Non-disclosure of previous refusal of motor insurance—Materiality.

The obligation on a person making a proposal for insurance against fire to disclose all material facts is not limited to matters exclusively relating to fire risks, but extends to any matter which would influence the judgment of the insurance company in deciding whether to take or refuse the risk.

The intending assured, in a proposal for fire insurance in respect of their premises, in answer to the question: " Has this or any other insurance of yours been declined by any other company ? " answered " No." Thereupon a policy was issued. It subsequently appeared that some time before that proposal the assured had applied to another company for a policy on motor-cars, but the application was declined on the grounds of misrepresentation and non-disclosure of certain facts:—

Held, that the non-disclosure of this refusal of the motor-car insurance was the non-disclosure of a material fact in the proposal for the fire insurance which therefore entitled the fire insurance company to avoid the policy.

Decision of Swift J. affirmed.

APPEAL from a decision of Swift J. on a special case stated by an arbitrator.

In November, 1931, Locker & Woolf, then in partnership, of whom Locker & Woolf, Ld., became the assignees (hereinafter called " the claimants "), sent to the Western Australian Insurance Company, Ld. (hereinafter called "the respondents"), a proposal for fire insurance in respect of their premises. The form contained certain questions preceded by the words: " The following questions to be answered by the proposer and to form the basis of the proposed insurance." To question 2: " Have you ever suffered loss by fire ? " the answer given was " Yes, 5*l*. Sea " ; and to question 4: " Has this or any other insurance of yours been declined by any other company ? " the answer given was " No." Thereupon the respondents issued to the claimants a policy which contained certain conditions, including " 1. This policy shall be voidable in the event of misrepresentation, misdescription, or non-disclosure in any material particular or untrue averment whatsoever by or on behalf of the insured and notice to or knowledge on the part of any agent of the company of anything which ought to have been disclosed to the company, shall not be deemed to be notice to or knowledge of the company."

"7. On the happening of any destruction or damage in respect of which a claim is or may be made under this policy the company and every person authorised by the company may, without thereby incurring any liability, and without diminishing the right of the company to rely upon any conditions of this policy, enter, take or keep possession of the building or premises where the destruction or damage has happened, and may take possession of or require to be delivered to them any of the property hereby insured and may keep possession of and deal with such property for all reasonable purposes and in any reasonable manner. This condition shall be evidence of the leave and licence of the insured to the company so to do. . . . ."

A fire occurred at the insured premises on April 11, 1934, and the claimants suffered loss thereby, the amount of loss for which the respondents would be liable being agreed at 3340*l.*

On April 12, 1934, the respondents instructed certain fire assessors to act for them in investigating the claim and loss, other assessors being instructed on behalf of other insurance companies interested. The salvage was taken possession of by the assessors and ultimately disposed of by auction. In taking possession of and selling the salvage the assessors were acting on behalf of all the insurance companies, but the respondents had not received any part of the salvage money to which they would have been entitled; nor did they themselves give any orders for the sales of salvage, but they knew that the salvage was to be sold by the assessors and took no steps to prevent those sales.

In November, 1919, Isaac Woolf while trading at Manchester had a fire which caused loss to him at that time.

In November, 1930, Locker & Woolf, then trading in partnership, applied to the National Insurance Company of Great Britain, Ld., for a policy of insurance in respect of their motor vehicles, but a policy was never issued, the policy being declined on the grounds of misrepresentations or untrue answers and non-disclosure in the proposal form signed by Locker on behalf of the partnership wherein the proposers stated that they had had no accidents in 1928–29, whereas in fact they had made six claims in respect of accidents in that year, and stated that they had only one accident in 1929–30, whereas they had in fact made four claims arising out of accidents in that year. The declinature of this proposal was notified to Locker & Woolf.

The respondents first had information that there had been a previous fire and that a refusal of insurance had taken place in a report from the assessors in July, 1934, but they had no information at that time of the dates or details, and they first received information of the declinature by the National Insurance Company in the first week of October, 1934, and they discovered the date of the Manchester fire in February, 1935.

It was contended for the respondents that there was a misrepresentation of a material fact in the answer to question 2, and that there was concealment or non-disclosure of a material fact in respect of the Manchester fire; that there was a misrepresentation of a material fact in answer to question 4 and that there was concealment or non-disclosure of a material fact in regard to the declinature of the motor insurance by the National Insurance Company; that in view of the above facts the policy was avoided under condition 1, that there had been no waiver, because by condition 7 of the policy the respondents were entitled to take or keep possession of the insured property and to deal with it in any reasonable manner without incurring any liability or diminishing their right to rely upon any condition of the policy.

It was contended on behalf of the claimants that the respondents by reason of the sale of the salvage were estopped from relying on any condition entitling them to avoid the policy and had waived the conditions with knowledge; that the loss by fire at Manchester was by Woolf alone and therefore the answer to question 2 which referred to the partnership only was true and there was no concealment or non-disclosure; that question 4 must be read in accordance with the ejusdem generis rule as meaning any other fire insurance, and did not include motor insurance, and therefore the answer was not inaccurate. Moreover the alleged misrepresentation could not affect the claimants, who were a limited company and in law a new entity differing from Locker & Woolf. Further, with the knowledge contained in their assessors' reports the respondents had elected to treat the insurance as subsisting.

The arbitrator found (1.) that the answer to question 2 was not untrue or inaccurate, as the answer was true in so far as it concerned the partnership, and the form of the question was ambiguous; (2.) that there was a non-disclosure or concealment of a material fact in omitting to bring to the notice of the respondents the fact that there was a fire on Isaac Woolf's premises in Manchester in 1919; (3.) that the answer to question 4 was untrue and there was a misrepresentation and concealment or non-disclosure of a material fact in failing to bring to the notice of the respondents the declinature of the proposed motor insurance with the National Insurance Company; (4.) that the respondents were not estopped from relying upon the conditions of the policy and that they had not waived their right to avoid the policy by any of the events which occurred between the occurrence of the fire and the repudiation of liability by them.

The arbitrator accordingly awarded, subject to the opinion of the Court, that the respondents were under no liability on the policy.

The question was whether the award in favour of the respondents was right.

Swift J. upheld the award, holding (1.) that the arbitrator was entitled to hold that the non-disclosure of the refusal by the National Insurance Company to entertain the proposed motor insurance was the non-disclosure of a material fact, notwithstanding that no evidence with regard to the materiality of that fact had been given; and (2.) that the respondents had done nothing to waive their right to avoid the policy.

The claimants appealed.

Pritt K.C. and *Soskice* for the appellants. The question is, Is it material in a proposal for fire insurance to state something that has happened on a proposal for motor-car insurance?

[SCOTT L.J. The arbitrator has found that it was material.]

The arbitrator has so found out of his inner consciousness. In the absence of evidence the arbitrator was not entitled to find as he did. If the insurance company desire to have information as to other insurances they should make this clear, and in this case they have not done so. Question 4 must be read, applying the ejusdem generis rule, as applying only to other fire insurance proposals or policies.

Secondly, the insurance company by their conduct in connection with the sales of the salvaged goods must be taken to have waived any right they might have to avoid the policy.

Croom-Johnson K.C. (*Astell Burt* and *F. H. Collier* with him) for the respondents. The arbitrator was entitled to find as he did both on the question of non-disclosure and waiver.

[He was stopped.]

Pritt K.C. replied.

SLESSER L.J. This case has been very fully argued, but in the view I take it falls within a comparatively small compass and can be decided on a limited number of considerations. That, however, does not mean that if the case goes further either side is excluded from any of the arguments upon which we have not found it necessary to adjudicate.

The question comes before us on appeal from a decision of Swift J. on an award stated in the form of a special case. The arbitration took place in accordance with a provision in a policy of insurance effected by Locker & Woolf when in partnership, of which Locker & Woolf, Ld., became the assignees. When the policy was originally taken out by the partnership they had to answer certain questions in a proposal form, and although the provision so often found in insurance contracts that the answers shall form part of the contract is absent in this instance, it will not be necessary to decide definitely on the relation of the proposal form to the contract, inasmuch as we are of opinion that there has here been such a non-disclosure of material facts as to make the contract voidable at the instance of the insurance company. The proposal form contained the following questions: "Have you ever suffered loss by fire?" to which the answer given was "Yes, 5*l*. Sea." That, we are told, refers to a loss to the extent of 5*l*. which was paid by the Sea Insurance Company. The answer, however, showed a considerable economy of the truth, for in reality one of the partners at a previous date had a very serious loss by fire; but the loss having been incurred by one only of the partners, the arbitrator found that in answering the question whether "you" have suffered loss it was not untrue, inasmuch as "you," collectively as a partnership, had not suffered loss. Whether that view is right it is unnecessary for us finally to decide in this case, but it is a very arguable point whether to the question have "you" suffered loss by fire the answer given was justified.

Another question in the proposal form was: "Has this or any other insurance of yours been declined by any other company?" to which the answer given was "No." The arbitrator came to the conclusion that that was a false answer and was the non-disclosure of a material fact, because a policy of insurance on the motor vehicles of Locker & Woolf had been declined by the National Insurance Company of Great Britain, Ld., and the two persons being then in partnership, to the question "Has this or any other insurance of yours been declined by any other company?" the answer given was incorrect, and the arbitrator held that it was a non-disclosure of a material fact, and as it is primarily on that determination that we have reached our conclusion it will be convenient to read the arbitrator's finding on the subject, which is as follows: "In November, 1930, the said Samuel Locker and Isaac Woolf then trading in partnership applied for a policy of insurance for their motor vehicles used for trade purposes to the National Insurance Company of Great Britain, Ld., and were issued a cover note. The said policy however was never issued and the proposal was declined by the said company on the grounds of misrepresentations or untrue answers and non-disclosure in the proposal form signed by S. Locker on behalf of the said partnership wherein the proposers had stated that they had no accidents in the year 1928–9 whereas in fact they had made six claims in respect of accidents in that year and stated that they had had only one accident in 1929–30 whereas they had in fact made four claims arising out of accidents in that year. The declinature of this proposal was notified to the said Locker and Woolf in a registered letter dated December 18, 1930, to which letter no reply was received." That information the respondents received from the National Insurance Company in October, 1934. It has been argued by Mr. Pritt that, even though that insurance had been declined, it was not, in the circumstances, a material fact to be disclosed, because a non-disclosure ought properly to be limited to matters affecting a proposal for a fire insurance. In my view that contention is untenable. It is elementary that one of the matters to be considered by an insurance company in entering into contractual relations with a proposed insurer is the question of the moral integrity of the proposer —what has been called the moral hazard. In the present case it is quite impossible to say that the non-disclosure by those proposing to take out a policy against fire risks that they have had an insurance on motors declined on the ground of untrue answers in the proposal form is not the non-disclosure of a fact very material for the insurance company to know —a fact which if known to the company might lead them to take the view that the proposers were undesirable persons with whom to have contractual relations. In those circumstances there can, in my opinion, be no doubt that on the general law of insurance the company were perfectly entitled to repudiate the contract on the ground of the non-disclosure of a material fact.

[The Lord Justice then dealt with the contention that the respondents, by their action, through their assessors, in taking possession of and selling the salvaged goods, had elected to treat the policy as subsisting, and came to the conclusion that they had not done these acts with full knowledge of the facts, particularly the fact of the refusal of the motor-car insurance.]

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Locker and Woolf, Ld. v. Western Australian Insurance Co.

Scott L.J. I agree and I propose to limit my judgment to the one point upon which we are deciding the case—namely, the non-disclosure in regard to the motor-car insurance. Were the facts as to that insurance material facts? The Marine Insurance Act, 1906, s. 18, sub-s. 2, provides that "every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk." There has been much discussion about materiality, but I think it is unnecessary to refer to the decisions relating to this, because the definition I have just read is applicable to all classes of insurance. In vol. 18 of Halsbury's Laws of England, 2nd ed., p. 408, para. 586—in the preparation of which I took part—the question what are "material facts," and the general principles applicable are discussed and the relevant cases are cited, amongst them *Becker* v. *Marshall* (1), where Scrutton L.J. said this: "In my view it is very important to maintain the obligation on the assured of communicating to the underwriter every material fact, and I understand, and have always understood, the definition of material fact to be that contained in the Marine Insurance Act." On the facts found by the arbitrator it is indisputable, if the above criterion be applied, that the proposal for the motor-car insurance and its refusal were material facts which should have been disclosed.

[The Lord Justice then dealt with the question whether the respondents had by their acts elected to treat the policy as subsisting, and held that they had not elected; and that they were entitled to rely on the non-disclosure as avoiding the policy.]

Eve J. I agree and have nothing to add.

Appeal dismissed.

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(1) (1922) 12 Ll. L. Rep. 413, 414.

C. A.
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LOCKER AND WOOLF, LD. *v.* WESTERN AUSTRALIAN INSURANCE CO.

Solicitors for appellants: *W. J. Pitman, for Arthur Hall-Wright & Son, Birmingham.*

Solicitors for respondents: *Wedlake, Letts & Birds, for Freeland & Passey, Birmingham.*

J. S. H.

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Nov. 7.

COLES *v.* ODHAMS PRESS, LIMITED, AND ANOTHER.

Gaming — Lottery — Publishing advertisement of lottery — Competition success in which does not depend upon skill — Cross-word competition in newspaper for money prize—Solution determined beforehand by competition editor—Betting and Lotteries Act, 1934, *s.* 22, *sub-s.* 1 (*c*); *s.* 26, *sub-s.* 1 (*b*).

A newspaper published an advertisement of a cross-word puzzle competition with a money prize, for which a competitor entered by posting his solution along with a specified fee to the office of the newspaper. The puzzle was so constructed that in a number of instances a clue could be satisfied by only one word having no alternative, while in other instances the clue suggested two or more alternative words which might not all be equally appropriate. The competition editor had prepared beforehand a test solution of the puzzle, and the prize was to be awarded to the competitor whose solution happened to correspond most closely to that of the competition editor, although, if all the solutions sent in were examined and compared on their merits, the solution of that competitor might not be found to be intrinsically the best:—

Held, that the proprietors and the printer of the newspaper were guilty of the offence of printing and publishing an advertisement of a "lottery" under the Betting and Lotteries Act, 1934, s. 22, sub-s. 1 (*c*) (i.).

Scott v. *Director of Public Prosecutions* [1914] 2 K. B. 868 distinguished.

Barclay v. *Pearson* [1893] 2 Ch. 154 held applicable.

CASE stated by a metropolitan magistrate.

Odhams Press, Ld., were the proprietors, and Mr. Charles Antil Gray was the publisher, of a newspaper called The People.

In its issue of January 27, 1935, that newspaper published an advertisement headed "Great Cross-word Offer, 2000*l*.," which stated that the newspaper would pay 2000*l.* for a correct or nearest correct solution on one coupon in accordance with the published solution, and would give other prizes. The solution was to be submitted on one of the entry form coupons printed in the newspaper, by signing which the entrant agreed to abide by the rules of the competition and to accept as final the decision of the competition editor in all matters appertaining to the competition. The rules required entry form coupons to be sent by post and accompanied by a postal order at the rate of 6*d.* for each two coupons or 1*s.* for each four coupons submitted. As to a number of the spaces in the puzzle the correct word for a space as indicated by the clue was not difficult to arrive at and had no alternative ; but as to some of the spaces any of two or more words would fill the appropriate space and to that extent the words were alternatives.

The competition editor had prepared his test solution of the puzzle before he saw the solutions submitted by the competitors.

Many persons took part in the competition and sent to the newspaper coupons with solutions accompanied by postal orders.

On March 16, 1935, four informations were laid by Chief Inspector E. Coles, of the Metropolitan Police (hereinafter called "the informant"), two of them against Odhams Press, Ld., and Mr. C. A. Gray respectively, for printing and publishing in the said newspaper an advertisement of a certain lottery called "Great Cross-word Offer, 2000*l.*", contrary to the Betting and Lotteries Act, 1934, s. 22, sub-s. 1 (*c*), and the other two against the same two defendants respectively for conducting in the said newspaper a certain competition called by the title aforesaid in which success did not depend to a substantial degree upon the exercise of skill contrary to the said Act, s. 26, sub-s. 1 (*b*) ; and on the same date four summonses issued calling upon the respective persons informed against (hereinafter called "the defendants") to answer to the respective informations.

On April 8, 1935, at Bow Street Police Court, the summonses were by consent heard together, when the above-mentioned facts were proved or admitted.

It was contended on behalf of the informant that many of the alternative words were equally accurate and appropriate, and that even though some skill might be exercised in arriving at the framework of the puzzle through the easier words which had no alternatives, if in fact there was no guide except a guess which could lead the competitor to determine which alternative word the editor would choose, then the scheme was a lottery, because the prize was, in the event, allotted by chance.

It was contended on behalf of the defendants that some element of skill was required to do the framework of the puzzle; that, in addition, the ingenuity and skill required to complete the puzzle consisted in discovering the so-called alternatives and then looking carefully and critically at the words of the clue and rejecting the less appropriate word; that the so-called alternatives were not really alternatives but that one word was more appropriate than the other; and that there was no case for the defendants to answer.

The magistrate, accepting that last contention, stopped the proceedings at the close of the case for the prosecution.

The magistrate found as a fact that in the greater number of cases the words chosen were the best and most appropriate, having regard to the clues, but that it was doubtful whether certain of the other words chosen were the most appropriate and had the best relation to the clues and that in the case of some of them the alternative word was better; but he was of opinion that the competition must be looked at as a whole, and that he was not justified in dividing the question into what counsel for the prosecution had described as two classes of words—namely, "easy words" and "difficult words," and he found as a fact that a considerable element of skill was required to solve the puzzle and that the people who had successfully solved it had exercised a substantial degree of skill; and on these grounds he dismissed all the summonses.

The question for the Court was whether the decision of the magistrate was correct in law.

Roland Oliver K.C. and *Eustace Fulton* for the informant, appellant. The first two summonses rightly charged that the defendants, in publishing the advertisement of this cross-word competition, published an advertisement of a lottery contrary to s. 22, sub-s. 1 (*c*), of the Betting and Lotteries Act, 1934; and the other two summonses rightly charged that the defendants, in publishing that advertisement, conducted a competition in which success did not depend on skill, contrary to s. 26, sub-s. 1 (*b*), of that Act.

[*Sir W. Jowitt K.C.* for the defendants, respondents: It is not disputed that, if the defendants are liable under the first two summonses, they cannot escape liability under the other two summonses.]

The defendants in publishing the advertisement of this cross-word competition published an advertisement of a lottery contrary to s. 22, sub-s. 1 (*c*), of the Act, inasmuch as on the facts and findings of fact the competition was one success in which depended on the whole not upon skill but upon chance. The puzzle was of this nature, that in a good many instances a clue could be satisfied by only one single word, while in other instances it might apparently be satisfied by any one or other of two or more alternative words, and the prize was to be awarded to the competitor whose solution corresponded most closely to a solution which had already been prepared by the competition editor. The puzzle may be regarded as consisting of two parts, first, the finding of the single words, and, second, the finding of the particular alternative words which had been selected by the competition editor. To find the single words would, no doubt, involve some small degree of skill. To complete the solution by finding the particular alternative words which had been chosen by the competition editor was, however, a matter not of skill but of chance. There was nothing in the advertisement of the competition to indicate to a competitor that there were alternative words corresponding to certain of the clues, and a competitor might fill in the first of these words that occurred to him without realizing that there were others which might be preferred by the competition editor. Even where a competitor realized that there were alternative words, it could not in many instances be said that any one of these words was more appropriate than any other, and a competitor could only guess which of them the competition editor would choose. Even if, in some instances, one of the alternative words was more appropriate than the other or others, it does not appear that in any of these instances the competition editor chose the most appropriate word. The magistrate has found as a fact that in some of these instances an alternative word was better than that chosen by the competition editor. A competitor might offer a solution which involved greater skill than that of the competition editor, and was even the best solution involving the greatest possible skill, yet he might not win the prize, because his solution would be judged, not according to the skill which it involved, but according to the extent to which it happened to coincide with the inferior solution of the competition editor. The fact that any solution of the puzzle involved some element of skill did not prevent the competition from being a lottery if the final test of success depended upon chance. The magistrate was wrong in holding that the competition must be looked at as a whole, and that the fact that it involved an element of skill rendered it legal in its entirety. The case of *Barclay* v. *Pearson* (1) related to a competition for the filling in of the missing word in a paragraph, there being alternative words and the winning word being deposited in the hands of an accountant in a sealed envelope, and that competition was there held to be a lottery. It is submitted that that case should be followed in the present case.

[LORD HEWART C.J. referred to *Blyth* v. *Hulton & Co., Ld.* (2)]

The cases of *Scott* v. *Director of Public Prosecutions* (3); *Hall* v. *Cox* (4); and *Caminada* v. *Hulton* (5), which will no doubt be relied upon on behalf of the defendants, are all distinguishable from the present case, inasmuch as in each of these cases the result of the competition depended not upon chance but upon skill or special knowledge. In the present case the competition in question, whether considered on its facts, on legal principle, or in the light of the authorities, is a lottery, and this appeal should be allowed.

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(1) [1893] 2 Ch. 154.
(2) (1908) 24 Times L. R. 719, C. A.
(3) [1914] 2 K. B. 868.
(4) [1899] 1 Q. B. 198.
(5) (1891) 60 L. J. (M. C.) 116.

Sir William Jowitt K.C. and *L. A. Byrne* for the defendants, respondents. The defendants in publishing in their newspaper the advertisement of this cross-word competition did not publish an advertisement of a lottery contrary to s. 22, sub-s. 1 (*c*), of the Betting and Lotteries Act, 1934. As has already been stated, the object of this competition consisted in finding for each of certain spaces in a form a word which had no alternative, and for each of certain other spaces one of several possible alternative words, and the prize was to go to the competitor whose solution most nearly resembled a solution which had been prepared by the competition editor. It is not disputed that the authorities show that a competition for a prize may be a lottery if it involves no substantial degree of skill. A competition may be a lottery either because it involves no skill at all, or because, although it offers some scope for skill, yet the selection or determination of the winner depends essentially upon chance. This competition was clearly not a lottery of the first of these types; neither was it a lottery of the second type, because the final selection of the prize-winner depended not upon chance but upon skill. In order to succeed in this competition a competitor had to exhibit two degrees of skill, first the lesser degree of skill necessary to enable him to fill in the more obvious words which had no alternatives, and secondly the greater degree of skill necessary to enable him to select those of the alternative words which had been selected by the competition editor, and were on the whole the most appropriate of all these alternative words, as the examination of these words shows. It was only by the exercise of considerable skill that a competitor could approach to the solution of the competition editor, and the greater the skill he showed the more nearly would he approach to that solution. In certain instances the question which of the alternative words was the most appropriate might no doubt admit of some diversity of opinion, but the fact that it involved some element of uncertainty did not make the competition a lottery. It is immaterial that the competition editor had prepared his solution before he saw the solutions of the competitors. There was sufficient evidence to support the finding of the magistrate that this cross-word puzzle looked at as a whole involved considerable skill. The authorities, so far as they are in point, support the general contention on behalf of the defendants that this competition is not a lottery, and also the more particular submissions made on their behalf. In the case of *Scott* v. *Director of Public Prosecutions* (1) the proprietors of a newspaper published an advertisement of a competition for prizes on the terms that each competitor should select one of certain words and compose a short sentence illustrating the word selected, the initial letter of each word in the sentence to be a letter of the selected word, and that the decision of the editor as to the prize-winners should be final, and it was held that the competition involved some degree of skill and was not a lottery. The competition in question in the present case involved as much skill as the competition in that case, and was therefore not a lottery. In reference to the competition in that case Lush J. said (2): "The answers appeal no doubt only to the taste or fancy of the person who is to adjudicate, and there was an element of chance in that sense in the competition, but that does not make the adjudication a mere determination by chance and nothing but chance." And Atkin J. there said (3): "the offer was intended to be, and would reasonably be understood to be, an offer of prizes for the best answers . . . . the test of merit would be the individual taste of the editor." In *Hall* v. *Cox* (4) it was held that an offer by a newspaper of a money prize for a correct prediction of the number of births and deaths in London during a named week was not a lottery; though it is obvious that the prediction of a particular competitor might have been a mere guess. The cases of *Barclay* v. *Pearson* (5) and *Hobbs* v. *Ward* (6) are distinguishable

(1) [1914] 2 K. B. 868.
(2) Ibid. 876.
(3) Ibid. 880.
(4) [1899] 1 Q. B. 198.
(5) [1893] 2 Ch. 154.
(6) (1929) 45 Times L. R. 373.

from the present case, because in each of these cases the result of the competition was purely arbitrary and no mind was ever brought to bear upon it.

LORD HEWART C.J. This is a case stated by a metropolitan magistrate. It arises out of a prosecution of the defendants, the present respondents, who are respectively a company owning a newspaper, and its publishers, under the Betting and Lotteries Act, 1934. There were four summonses, two under s. 22, sub-s. 1 (*c*), and two under s. 26, sub-s. 1 (*b*), of that statute, and the case states that the four summonses were by consent heard together. The magistrate, having heard the evidence for the prosecution, accepted a submission on the part of counsel for the defendants that there was no case to answer.

The first of the summonses was based on the charge that the company, as proprietors of a certain newspaper, published on a day in January, 1935, an advertisement of a certain lottery promoted in Great Britain—namely, a lottery called "Great Cross-word Offer, 2000*l*.", contrary to s. 22, sub-s. 1 (*c*), of the Act. The second summons charged the publisher with a like offence. The third summons charged the company, as proprietors, with conducting on the same day in the newspaper a certain competition called "Great Cross-word Offer, 2000*l*.", in which success did not depend to a substantial degree on the exercise of skill, contrary to s. 26, sub-s. 1 (*b*), of the statute. The fourth summons charged the publisher with a like offence.

The conclusion of the magistrate is set out in these words, and it claims to be a conclusion of fact: "I found, as a fact, that in a greater number of cases the words chosen"—that is to say, by the editor—"were the best and most appropriate words, having regard to the clues, but that it was doubtful whether certain of the other words chosen were the most appropriate and had the best relation to the clues, and that in the case of some of them the alternative word was better; but I was of opinion that the competition must be looked at as a whole, and that I was not justified in dividing the question into what Mr. Oliver describes as the two classes of words—namely, easy words and difficult words; and I found as a

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fact that a considerable element of skill was required to solve the puzzle, and that the people who had successfully solved the puzzle had exercised a substantial degree of skill."

The question before us is the quite usual question, whether there was evidence on which the magistrate was entitled to come to that conclusion. If there was evidence, this Court would not interfere. If there was no evidence, it follows that the conclusion was wrong.

Our attention has been directed, as it always is directed in cases of this kind, to *Scott* v. *Director of Public Prosecutions* (1), which was decided in the year 1914, twenty-one years ago. The judgments in that case must obviously be read in close connection with its facts, and there seems to me to be not merely some difference but, in the words of the ancient philosopher, "all the difference" between the facts of that case and those of the present case. In that case there was an advertisement of a competition, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected. The literary results so achieved were to be sent in to the editor of a newspaper, who on his part undertook that all of them should receive careful consideration, and that then, having all of them before him, he would adjudicate finally and beyond the possibility of appeal on the question which was the best of them. In other words, it was, within its modest limits, a kind of literary competition in which the editor was to be arbiter. There were many grounds on which it was suggested that that competition was a lottery. It was argued, on the other hand, that there was enough involved in it in the nature of skill to save the competition from being a mischief of that description, and the Court so held, Channell J. concurring in the decision with some reluctance. It seems to me that there is all the difference in the world between a case where persons engaged in a literary competition allow somebody else to pick out the best of their efforts and agree to abide by his decision, and a case where persons undertake to make a series of shots at something already

(1) [1914] 2 K. B. 868.

decided behind their backs, not on the terms that anybody shall exercise judgment in deciding which is the best and most skilful of the competitors' efforts, but on the terms that somebody shall perform the task of deciding which comes nearest to a secretly fixed standard. *Scott* v. *Director of Public Prosecutions* (1) seems to me to have no bearing on the present case, except as illustrating the distinction which exists between them.

It is to be observed, however, that in the case of *Scott* v. *Director of Public Prosecutions* Lush J., the senior member of the Court which decided that case, said in his written judgment (2): "Now, a scheme may either be on the face of it a lottery, that is a scheme for distributing money according to mere chance, or if it is not, it may be shown by extraneous evidence that the parties concerned contemplated that it would be conducted in that way." The question which I ask myself is whether the inevitable conclusion on the materials before us now is not that this scheme is, on the face of it, a lottery. What was the scheme? Certain incomplete words which, put together, might make a cross-word puzzle were suggested by means of a series of clues. Acting on those clues, the competitor, who paid 3*d*. for one attempt or 1*s*. for four attempts, sent in a complete body of cross-words—the solution of the cross-word puzzle. When all the answers had been received and the appropriate date had been reached the question then arose and was decided which of those solutions coincided in the greatest number of particulars with the words selected beforehand by the competition editor. All that remained after the advertisement of the scheme was that the cross-word solutions should be sent in, and then it was to be ascertained which came nearest to a solution to the puzzle already made, but hidden from the competitors. That scheme seems to me to approach as nearly as possible, not indeed in all respects, but in most material respects, to the scheme which was dealt with and held to be a lottery in the case of *Barclay* v. *Pearson*. (3)

(1) [1914] 2 K. B. 868.

(2) Ibid. 875.

(3) [1893] 2 Ch. 154.

That being the scheme as advertised in the newspaper, the first summons charges the advertisement of a certain lottery. What is a lottery? A lottery is a distribution of prizes by lot or chance. The charge here is that the defendants on the day in question advertised a distribution of prizes by chance. What else was it? I have read the scheme again and again, and there is nothing in it to suggest, much less to undertake, that the solution adjudged to be correct will be intrinsically, or will even be thought to be, the best solution. There is nothing to suggest, much less to undertake, that the competition editor will seek to find or to prescribe the best solution. There is no clue at all to the qualifications of the editor, or to the frame of mind in which he will act, or has already acted at the material time. There is no clue to the criterion, if any, by reference to which the standard has been fixed. The solution which is to be adjudged to be correct is not to be picked out of the efforts of the competitors in competition with each other. It is to be the solution that is found, on examination, to coincide most nearly with a set of words chosen beforehand by somebody not known, by a method, if any, not stated, that person being perfectly at liberty to act in an arbitrary, capricious, or even mischievous spirit. In other words, the competitors are invited to pay a certain number of pence to have the opportunity of taking blind shots at a hidden target.

The magistrate has thought fit to find that this competition involved and contemplated a degree of skill. But skill about what? The element of skill, if any, is, in my opinion, to be directed, and directed only, to the lucky guessing of the details of a mysterious collection of unrelated words, selected beforehand by a person whose idiosyncrasies are as completely concealed as his methods, and whose ignorance may be coextensive with the wisdom of Solomon. I see the word "lottery" written all over this scheme, and it passes my comprehension to understand how the magistrate could have come to the conclusion to which he came.

The case has been presented, or obscured, with a wealth of etymological, grammatical, and miscellaneous information, sufficient, one would think, to surprise and indeed to bewilder any competition editor. The argument has been most interesting, but, in my opinion, almost wholly beside the mark. The question is: What was the nature of that which was being advertised? In my opinion, it comes within the words used by Lush J., "on the face of it a lottery." I think, therefore, that, on the material which the magistrate had before him, he came to a wrong conclusion, and that the only possible conclusion was that the offence had been committed.

I see from the shorthand note of the proceedings before the magistrate that, at the conclusion of the matter, the magistrate said to counsel who appeared for the defendants: "You must decide whether you will call your evidence. If you desire to call it, I will give you permission to do so now." And the answer was: "No, I think not." That is to say, being invited to offer what evidence was to be offered, then and there, counsel decided to refrain from offering any evidence. He was perfectly within his rights in doing so, and it follows, therefore, that, when this case goes back to the magistrate with a direction that this advertisement is, upon the face of it, the advertisement of a lottery within the meaning of s. 22, sub-s. 1 (*c*) (i.), of the Act, the defendants will be entitled to offer such evidence as appears to them to be suitable. I cannot imagine what evidence can possibly be offered which could prevent the conclusion that the offence has been committed, but it will be for the magistrate to consider the effect of any evidence that may be offered.

I think that this appeal should be allowed, and the case remitted in the manner which I have indicated.

HUMPHREYS J. I entirely agree with every word of the judgment which has been delivered by my Lord.

I only desire to add very few words. This is a case about an alleged lottery. There will seemingly never be any finality on the question what is a lottery. It has been said more than once in judgments by members of this Court that so soon as a particular scheme is declared by a decision of the

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Court to be a lottery the skill and ingenuity of a number of extremely able persons will be exercised in trying to discover some means of avoiding the effect of that decision. On the other hand, it is not uninteresting to observe that the view taken by those who are the usual prosecutors in such cases may vary from time to time. As the result of a number of cases decided by this Court, and some decided by magistrates, in which competitions were held to be lotteries, in a year which I think I am correct in saying was 1921, a scheme was evolved which was believed to be prosecution-proof. On that scheme being tested at Bow Street Police Court, it was held by the magistrate to be a legal scheme. Much consideration was given to the matter in those days by the authorities, and it was decided not to contest the finding of the magistrate that that scheme was legal and did not amount to a lottery. In 1929, however, that precise scheme came before this Court in *Hobbs* v. *Ward* (1) and was held by the Court, my Lord presiding, the other judges being Avory J. and Swift J., without any doubt at all to be a lottery. I only make those observations with reference to the decision in *Scott* v. *Director of Public Prosecutions.* (2) I desire to add nothing to what my Lord has said with regard to that case, except that it may be that if, with the knowledge gained from cases which have been decided since that case, the learned judges who decided that case were able to deal with the matter again, they might come now to a different conclusion.

Out of respect for the argument of Sir William Jowitt I just want to say about the present case that more than once he used the expression that he claimed that the competition editor of this newspaper had found the only possible correct solution of this cross-word puzzle which was to be obtained from the clues furnished. If that claim were well founded it would mean that this was a case in which there was a fact to be ascertained which might have been ascertained already or might fall to be ascertained at a later date, and, if that were the truth of the matter, I cannot doubt that Sir William Jowitt's argument would be right, because the case would

(1) 45 Times L. R. 373.

(2) [1914] 2 K. B. 868.

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fall, as it seems to me, precisely within *Caminada* v. *Hulton* (1) and *Hall* v. *Cox*. (2) But I think it is impossible to say, on the findings of the magistrate in this case, that the only possible solution, or, in other words, the necessarily correct solution, of this puzzle is that which the competition editor put forward as his solution and which was published in the newspaper as the correct solution. I think that it is quite obvious from the argument which has taken place before us to-day that there are alternative solutions which some people might think better, some people might think not so good, and some people might think equally good with that of the competition editor. When there are alternative solutions of such a puzzle as this the difficulty arises that the competitor who is the person to be considered, is invited to decide which of two or more alternative solutions will be selected by some person whom he does not know, and by some method which is not indicated. In my view, as my Lord has said, an invitation to enter such a competition is on the face of it an invitation to take part in a lottery.

I think that we have very little to do with the question what is in our opinion or what was in the magistrate's opinion the best as between one suggested solution and another suggested solution. It seems to me that this competition is one which, on the face of it, is a lottery. What we are dealing with here in the first summons against each defendant is the advertisement, and it seems to me that the advertisement is, on the face of it, an invitation to persons to guess—because it can only be done by guessing—what will be the view of some unknown person who is called the competition editor as to the correct answer to give to a question connected with a cross-word puzzle. That seems to me to be plainly a lottery, and, in my view, this appeal should be allowed.

SINGLETON J. I agree that the appeal should be allowed. I am satisfied that the magistrate was wrong in deciding that there was no case to answer.

Appeal allowed. Case remitted.

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(1) 60 L. J. (M. C.) 116.

(2) [1899] 1 Q. B. 198.

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Coles v. Odhams Press, Ld.

Solicitor for the appellant: *The Solicitor for the Metropolitan Police.*

Solicitors for the respondents: *Lewis & Lewis.*

J. R.

1936 *Feb.* 3, 10.

LONDON COUNTY COUNCIL *v.* BETTS.

LONDON COUNTY COUNCIL *v.* DOWNES.

Poor Law—Maintenance Order—Arrears—Recovery—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 19—*Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35—*Poor Law Amendment Act,* 1868 (31 & 32 *Vict. c.* 122), *s.* 33—*Poor Law Act,* 1927 (17 & 18 *Geo.* 5, *c.* 14), *s.* 43, *sub-s.* 1—*Poor Law Act,* 1930 (20 *Geo.* 5, *c.* 17), *s.* 19, *sub-s.* 1.

Where an order has been made in petty sessions upon a husband to pay a sum weekly or otherwise towards the cost of poor relief given to his wife, and the payments thereunder fall into arrear, complaint may be made to a court of summary jurisdiction, and the court has power under the Summary Jurisdiction Act, 1879, to enforce the payments due under the order as a civil debt, although no mode of recovery is prescribed by the Poor Law Act, 1930, s. 19, sub-s. 1 (re-enacting the Poor Law Act, 1927, s. 43, sub-s. 1).

LONDON COUNTY COUNCIL *v.* BETTS.

Case stated by metropolitan magistrate.

On February 1, 1910, a complaint was made by the Southwark Guardians before a metropolitan magistrate sitting at Tower Bridge Police Court, that Catherine Betts, wife of the respondent John Betts, had become chargeable to the Southwark Union, and that the respondent was able to maintain his wife. Upon the hearing an order was made under the Poor Law Amendment Act, 1868, s. 33, that the respondent pay to the Southwark Guardians the sum of two shillings weekly towards her maintenance until she should cease to be so chargeable or until further order. The respondent failed to pay certain instalments under this order and on October 4, 1935, a complaint was preferred against him by the London County

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Council (in whom the functions of the guardians were then vested by the Local Government Act, 1929) that there was then due as arrears under the above order the sum of 2*l.* 8*s.*

According to the case stated, the following facts were proved at the hearing: (1.) the making of the order upon the respondent dated February 1, 1910, to pay 2*s.* per week towards the maintenance of his wife; and (2.) that the sum of 2*l.* 8*s.* was due from the respondent to the appellants as arrears thereunder.

The case concluded: "My attention was directed to a doubt whether the Court had any jurisdiction to enforce the payment of arrears by making an order for debt, which was the order applied for, by reason of the repeal of s. 33 of the Poor Law Amendment Act, 1868, by the Poor Law Act, 1927, and the absence of any substituted mode of recovery either in that Act or in the subsequent Poor Law Act, 1930."

On the part of the appellants it was contended that notwithstanding the repeal of s. 33 of the Poor Law Amendment Act, 1868, the arrears of 2*l.* 8*s.* were recoverable under the civil debt provisions of the Summary Jurisdiction Act, 1879.

The learned magistrate dismissed the summons for want of jurisdiction, but stated this case at the request of the London County Council. In the course of a considered judgment he said that it was clear that the Summary Jurisdiction Act, 1879, ss. 6 and 35, provided machinery only, and that such machinery was applicable only when some other statute had made the sum sued for recoverable by order of a court of summary jurisdiction. The Poor Law Act, 1930, s. 19, had no application beyond the granting of an original order for maintenance, and did not include any power to recover arrears by virtue of the civil debt provisions of the Summary Jurisdiction Acts by order under the Act of 1879, ss. 6 and 35.

In re Gamble (1), which was cited by the applicants, was decided by reference to s. 36 of the Poor Law Amendment Act, 1868, but as that section was also repealed by the Poor Law Act, 1927, it was no authority on the point. There was, since the Poor Law Act, 1927, no statutory provision for the

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(1) [1899] 1 Q. B. 305.

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enforcement of the arrears under a maintenance order such as was now asked for by the applicants.

Before 1927 arrears could have been recovered by order of a court of summary jurisdiction under the Poor Law Amendment Act, 1868, but the material provisions of the Act of 1868 were now repealed.

The question for the opinion of the Court was whether upon the facts appearing in the case stated the learned magistrate came to a correct determination in point of law.

LONDON COUNTY COUNCIL *v.* DOWNES.

The facts in this case were similar to those in *London County Council* v. *Betts*, except that the order in *Downes'* case was made under the Poor Law Act, 1927, and not under the Poor Law Amendment Act, 1868. The two cases were heard at the same time, and the same order was made in both.

Vernon Gattie for the appellants. These arrears of maintenance are recoverable from the husband by order under the Summary Jurisdiction Act, 1879, ss. 6 and 35. It is true that the Poor Law Amendment Act, 1868, s. 33, was repealed by the Poor Law Act, 1927. But the power of a court of summary jurisdiction to order payment of arrears due under a maintenance order was not thereby ended. Such power was conferred by the Act of 1879, which provided (s. 6) that such sums should be recoverable as a civil debt under that Act and not otherwise. So s. 35 of the Act of 1879 provided that a court of summary jurisdiction should have authority to make an order on complaint under the Summary Jurisdiction Acts enforcing payment as a civil debt: *In re Gamble.* (1) Under the Poor Law Act, 1930, s. 19, power to order a husband to contribute to his wife's maintenance is conferred upon a court of summary jurisdiction "on complaint." No mode of enforcing payment of arrears is laid down in the Poor Law Act of 1930, but this is derived from the Summary Jurisdiction Act, 1879, and further provision in the Poor Law Acts was unnecessary.

The same arguments apply in *Downes'* case, the only

(1) [1899] 1 Q. B. 305.

difference being that the order upon the husband was there made under the Poor Law Act, 1927, and not under the Act of 1868.

[The respondents did not appear in either case and were not represented.]

Cur. adv. vult.

1936. Feb. 10. The following considered judgments were read :—

TALBOT J. In this case the London County Council, as Poor Law authority, complained to one of the metropolitan police magistrates that certain payments ordered under the Poor Law Amendment Act, 1868, by another magistrate at the same court in 1910, to be made by the respondent for the maintenance of his wife by the Poor Law authority then existing, were in arrear to the amount of *2l.* 8*s.*, and applied for an order for payment of the said arrears. The learned magistrate held that he had no jurisdiction to hear the complaint or to make the order, and dismissed the complaint accordingly. To found the magistrate's jurisdiction the money must be due under some Act (whether passed before or after 1879) which makes it recoverable on complaint. Then by the Summary Jurisdiction Act, 1879, s. 6, such sum is to be deemed to be a civil debt, and is to be recovered as a sum declared by the Act of 1879 to be a civil debt is recoverable under that Act, *and not otherwise.* By the Act of 1879, s. 35, any sum declared by that Act or any future Act to be a civil debt, which is recoverable summarily, or "in respect of the recovery of which jurisdiction is given by such Act to a court of summary jurisdiction, shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts." The power of a court of summary jurisdiction to make an order upon a husband for maintenance payments and to determine how and to whom they shall be paid, is now conferred by the Poor Law Act, 1930, s. 19, the relevant section (s. 33) of the Act of 1868, under which the original order in the present case was made in 1910, having been repealed. By the Act of 1930, s. 19, the order is to be made on complaint ; and this of itself, apart from the Summary Jurisdiction Act, 1879, makes what is ordered to be paid become a civil debt : *In re Gamble.* (1)

The result, in my opinion, is that the learned magistrate had jurisdiction by virtue of the Summary Jurisdiction Act, 1879, ss. 6 and 35, to make an order for the payment of arrears due under the order made upon the respondent under the Poor Law Amendment Act, 1868, notwithstanding the repeal of s. 33 of that Act.

The draftsmen of the Poor Law Acts, 1927 and 1930 (in both of which the special provisions of s. 33 of the Act of 1868 applying the Summary Jurisdiction Act, 1848, as to the mode of recovering money ordered by courts of summary jurisdiction to be paid, are omitted), evidently thought, and in my opinion rightly, that since the passing of the Summary Jurisdiction Act, 1879, they had become unnecessary.

The case of *Downes*, in which a special case was also stated by the same learned magistrate, raises the same point, though the order in *Downes'* case was made under the Poor Law Act, 1927, and not under the Act of 1868.

With great respect to the learned magistrate, I think he was mistaken in holding that he had no jurisdiction to hear these complaints, and they must therefore be remitted to him with a direction to make the orders as asked.

MACNAGHTEN J. I am of the same opinion. The order dated February 1, 1910, made on the complaint of the Guardians of the Poor of the Southwark Union, whereby the respondent, John Henry Betts, was ordered to pay 2*s*. per week towards the cost of the relief of his wife, was made under the Poor Law Amendment Act, 1868, s. 33, which provided that, where a married woman required relief without her husband, the justices in petty sessions might make an order upon the husband to pay such sum weekly or otherwise, towards the cost of the relief of his wife, as should appear to them, having regard to all the circumstances of the case, to be proper, and

(1) [1899] 1 Q. B. 305.

that, if the payments due thereunder were in arrear, the order should be enforced in the manner prescribed by the Summary Jurisdiction Act, 1848. The Poor Law Act, 1927, consolidated into a single Act the various enactments, which were then in force, relating to the relief of the poor in England and Wales. Sect. 245 of that Act repealed the existing enactments (including the Poor Law Amendment Act, 1868, s. 33), and provided by the same section that any order made under any enactment thereby repealed should have effect as if it had been made under the corresponding section of that Act, and might be enforced accordingly. Sect. 43, sub-s. 1, of the Poor Law Act, 1927, corresponds with s. 33 of the Poor Law Amendment Act, 1868; it re-enacts so much of that section as empowered a court of summary jurisdiction, where a married woman required relief without her husband, to make an order of maintenance upon the husband; but it did not re-enact the latter part of the section, which provided for the enforcement of such an order in the manner prescribed by the Summary Jurisdiction Act, 1848, because, as it seems to me, that provision had been rendered inoperative for nearly fifty years by the Summary Jurisdiction Act, 1879, s. 6. The functions of the Guardians of the Poor of the Southwark Union were transferred to the appellants, the London County Council, by the Local Government Act, 1929: and in the following year the law relating to the relief of the poor was again consolidated by the Poor Law Act, 1930. Sect. 19, sub-s. 1, of that Act corresponds with s. 43, sub-s. 1, of the Poor Law Act, 1927.

The learned magistrate dismissed the summons issued on the complaint of the London County Council that the payments due under the order of February 1, 1910, were in arrear: he dismissed it for want of jurisdiction. In his opinion, if I rightly understand his judgment, the order of February 1, 1910, was enforceable in the manner prescribed by the Summary Jurisdiction Act, 1848, until the Poor Law Act, 1927, came into force; but that by reason of the omission in s. 43, sub-s. 1, of that Act and s. 19, sub-s. 1, of the consolidating Act of 1930 of any express provision for the enforcement of orders of maintenance made thereunder, such orders could not be enforced by a court of summary jurisdiction, and that he therefore had no jurisdiction to enforce the order of February 1, 1910.

In my opinion this view is erroneous: it is based, I think, upon a misapprehension of the meaning and effect of s. 6 of the Summary Jurisdiction Act, 1879. Under the provisions of the Summary Jurisdiction Act, 1848, an order for the payment of money could be enforced by imprisonment: and the Debtors Act, 1869, which provided that, subject to certain exceptions, no person should be imprisoned for making default in the payment of a sum of money, did did not affect the power of imprisonment conferred upon courts of summary jurisdiction by the Summary Jurisdiction Act, 1848, because one of the exceptions mentioned in the Debtors Act was "default in payment of any sum recoverable summarily before a Justice or Justices of the Peace." Ten years later, however, Parliament was minded to restrict the power of imprisonment in the case of money recoverable on complaint to a court of summary jurisdiction: and accordingly it was provided by the Summary Jurisdiction Act, 1879, s. 6, that "where under any Act, whether past or future, a sum of money . . . . is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise." The language of this section is certainly involved, but the meaning is plain enough. A sum of money which is by statute recoverable on complaint to a court of summary jurisdiction is to be deemed "a civil debt" and an order for the payment of such a sum may be enforced by the court in the manner prescribed by the Summary Jurisdiction Act, 1879, in the case of civil debts and not otherwise. The Summary Jurisdiction Act, 1879, s. 35, deals with the enforcement of orders for the payment of civil debts. It provides that such orders can no longer be enforced by imprisonment except (to put it shortly) on proof of means, and that then a court of summary jurisdiction is to have no greater power of imprisonment than that given to a county court under the Debtors Act, 1869. In my opinion, therefore, an order for maintenance made under the Poor Law Amendment Act, 1868, s. 33, or under the Poor Law Act, 1927, s. 43, sub-s. 1, or under the Poor Law Act, 1930, s. 19, sub-s. 1, can be enforced by a court of summary jurisdiction as a civil debt under the Summary Jurisdiction Act, 1879, s. 6.

In the case of *Downes*, the order dated March 21, 1929, was duly made under the Poor Law Act, 1927, s. 43, sub-s. 1.

I think, therefore, that both the appeals should be allowed.

du Parcq J. I agree that the learned magistrate was wrong in holding that he had no jurisdiction to make the orders for which application was made in these two cases. The difficulty which the learned magistrate felt was occasioned by the repeal of the Poor Law Amendment Act, 1868, s. 33, by the Poor Law Act, 1927, and, to use his own words, " the absence of any substituted mode of recovery either in that Act or the subsequent Poor Law Act, 1930." The repealing section of the Poor Law Act, 1927, s. 245, contained a proviso which, if words immaterial for the present purpose are omitted, is as follows : " Nothing in this repeal shall affect any Order made or proceedings taken under any enactment hereby repealed, but any such Order or proceedings shall have effect as if made or taken under the corresponding provision of this Act, and may be enforced accordingly." The Poor Law Act, 1930, s. 164, by which the greater part of the Poor Law Act, 1927, was repealed, contained a proviso in the same terms.

The order made against John Betts on February 1, 1910, whereby he was ordered to pay 2*s*. per week to the Guardians of the Poor towards the relief of his wife, was made under the Poor Law Amendment Act, 1868, s. 33. That section contained a provision for the enforcement of orders made under it which is not reproduced in the Poor Law Acts of 1927 and 1930. This omission is easy to understand. What

s. 33 of the 1868 Act provided was that orders made under it should be enforced in the manner prescribed by the Summary Jurisdiction Act, 1848. The manner prescribed by the 1848 Act in cases where an order required the payment of a sum of money, was the issue of a distress warrant by the justices. The Summary Jurisdiction Act, 1879, s. 6, provided however that where under any Act, past or future, a sum of money claimed to be due was recoverable on complaint to a court of summary jurisdiction and not on information, such sum was to be deemed to be a civil debt and was to be recovered in the manner in which a sum declared by the same Act to be a civil debt recoverable summarily was recoverable thereunder and not otherwise. Since 1879 therefore the procedure prescribed by the Act of 1848 had been abolished for this purpose, and it would have been surprising if the reference to the 1848 Act in the Act of 1868, s. 33, had been reproduced in the Poor Law Acts of 1927 and 1930.

The learned magistrate is however right, in my opinion, when he says that the Poor Law Acts of 1927 and 1930 prescribe no means of recovery of sums due under orders made in pursuance of the sections of those Acts (ss. 43 and 19 respectively) which give power to obtain maintenance orders. The answer suggested to the argument of the learned magistrate is that it was unnecessary to prescribe a mode of recovery in these Acts because the mode of recovery was already prescribed by the Summary Jurisdiction Act, 1879. Speaking for myself alone, I am doubtful whether the difficulty felt by the learned magistrate can be disposed of so readily. In my view the application made by the Southwark Guardians on February 1, 1910, was not an application whereby any sum was claimed to be due, nor was any sum recovered or recoverable upon that application. No sum was claimed to be due until Betts made default, and there is nothing to show that the sum of 2*l*. 8*s*. now said to be due from him was claimed to be due at any date prior to October 4, 1935. Further, it is, in my opinion, at least doubtful whether it can be said that by s. 19 of the Poor Law Act, 1930, " jurisdiction is given to a court of summary jurisdiction in respect of the *recovery* " of the sums which under that section the court may order to be paid, so as to bring the sums now claimed within the Summary Jurisdiction Act, 1879, s. 35.

I incline to the view therefore that if, when the learned magistrate was asked to make the order in this case, he had been referred only to the Summary Jurisdiction Act, 1879, as the source of his jurisdiction, he would have been right in thinking that that Act by itself did not confer jurisdiction upon him. I agree with him also that the repealed Act of 1868 could not be relied upon for this purpose. Although I share the difficulty of the learned magistrate to this extent, I arrive at the same goal as my brethren by, I fear, a more circuitous road. I need not say that I am willing to believe that the shorter way may be the better. I will, however, set out the steps in my journey as briefly as possible: (1.) The order of February 1, 1910, must have effect as if made under the Poor Law Act, 1930, s. 19; (2.) The Poor Law Act, 1930, does not state or provide any mode of enforcing payment of the sums of money payable under maintenance orders such as the order of February 1, 1910; (3.) The Summary Jurisdiction Act, 1848, s. 19, provided that where an order required the payment of a sum of money and by the statute in that behalf no mode of enforcing the payment of the same was stated or provided, justices might issue distress warrants; (4.) An application to the justices for a distress warrant under the Summary Jurisdiction Act, 1848 (Jervis's Act), was properly made by complaint and not on information. This proposition is established by the judgments in *In re Gamble* (1) (see especially the judgment of Wills J.).

It follows in my judgment that this application came exactly within the words of the Summary Jurisdiction Act, 1879, s. 6. The sum due was recoverable under a past Act, that is to say, the Act of 1848, on complaint to a court of summary jurisdiction, and in these circumstances the Act of 1879 comes into operation to say that the procedure prescribed by the Act of 1848 is not to be followed, but the sum is to be recovered as a civil debt.

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(1) [1899] 1 Q. B. 305, 307.

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L. C. C. *v.* Betts.

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du Parcq J.

The order in the case of *Downes* was made under the Poor Law Act, 1927, and the reasoning which leads me to differ from the learned magistrate in the case of *Betts* obviously applies to *Downes'* case also.

I accordingly concur in the judgments proposed.

Appeals allowed.

Solicitor for the appellants: *J. R. Howard Roberts.*

F. P. F.

C. A.

1935

Dec. 9, 10.

WRAGG *v.* SAMUEL FOX AND COMPANY, LIMITED.

Workmen's Compensation—Industrial Disease—Silicosis—Total disablement—Claim for Compensation—Employment in processes mentioned in Scheme—" Any operation underground in any coal mine "—Amendment of Scheme—Where to be inserted in Scheme—Whether subject to Proviso to sub-para. (*iii.*) *of para.* 2 *of Scheme—Workmen's Compensation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 47—*Workmen's Compensation* (*Silicosis and Asbestosis*) *Act*, 1930 (20 & 21 *Geo.* 5, *c.* 29), *s.* 1 *and Schedule—Various Industries* (*Silicosis*) *Scheme*, 1931 (*St. R. & O.* 1931, *No.* 342), *para.* 2—*Various Industries* (*Silicosis*) *Amendment Scheme*, 1934 (*St. R. & O.* 1934, *No.* 1155).

The amendment to the Various Industries (Silicosis) Scheme, 1931, made by the Various Industries (Silicosis) Amendment Scheme, 1934, providing that the processes specified in para. 2 of the Scheme of 1931 should include "any operation underground in any coal mine" must be inserted in para. 2 of the Scheme of 1931 not as a new sub-paragraph but in sub-para. iii. of para. 2 of the Scheme immediately before the proviso to that sub-paragraph, so that an employer is still entitled to the benefit of that proviso and entitled to show that, though a workman claiming compensation for total disablement through silicosis had been engaged in operations underground in a coal mine, nevertheless he had not been exposed to the dust of silica rock and that therefore the employer was not liable to pay him compensation.

APPEAL from an award of the judge of the Sheffield County Court sitting as arbitrator under the Workmen's Compensation Acts.

The applicant, Maurice Wragg, was employed by the respondents, Samuel Fox & Co., Ld., colliery proprietors, on heading work and drifting in stone in a coal mine.

On June 21, 1935, the Medical Board under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, certified that the applicant was totally disabled from silicosis, and that the total disablement commenced on April 19, 1935.

The applicant applied for arbitration to fix the amount of compensation payable to him under the Workmen's Compensation Acts and the Various Industries (Silicosis) Schemes, 1930–1934.

The applicant alleged that the above mentioned disease was due to the nature of his employment in a coal mine and that he was last employed in such employment within the twelve months previous to the date of disablement by the respondents. He claimed 30*s.* per week from April 19, 1935, to the date of the award and thereafter during incapacity.

The respondents by their answer said that the applicant was not at any material time employed by the respondents in any process mentioned in the Various Industries (Silicosis) Scheme, 1931, or any amendment of that Scheme. They also said that the applicant was not engaged in any process or operation underground which exposed him to the dust of silica rock whilst in the respondents' employment; that the disease of silicosis could not have been contracted by the applicant whilst in the respondents' employment, and that it was not due to the nature of the applicant's employment with the respondents.

The following statement of facts is taken from the judgment of the county court judge: The applicant Wragg was employed by the respondents for forty-one years up to April 19, 1935, the last twenty years of this being spent in underground work, heading and ripping on alternate days. This work entailed driving through a stone termed by the geologist mudstone, and in addition to the use of pick and crowbar, blasting was carried out. I am satisfied that the applicant was constantly exposed to "dust." For the last few years of his life the applicant has experienced what he called "tightness" and finally ceased work on April 19, 1935. He was examined by

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the Medical Board appointed for the purpose, and on June 21, 1935, was duly certified as suffering from silicosis and totally incapacitated. The commencement of the disablement was certified as April 19, 1935. After hearing Dr. Platt, I was satisfied that the applicant was still totally incapacitated; further that the silicosis was due to the nature of his employment with the respondents, and that the disease could not have been contracted in any other way.

Professor Gilligan was called before me, and I am satisfied on his evidence that the applicant was not exposed to the dust of silica rock. In this connection I have taken into account the following passage from Lord Atkin's speech in *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (1): "It is not necessary that the 'dust of silica rock' should be the dust of silica rock which is being at the time reduced to dust by the workman's operations. The workman was in fact being exposed to the dust of silica rock, viz., the free silica in the shale which is truly the dust of quartz." I am also satisfied that the material in which the applicant worked was not silica rock or dried quartzose sand or dry deposit or dry residue of silica or a dry admixture containing such materials, and that the applicant did not handle or move such materials. That is to say, I find that the material worked in is not within the lists contained in sub-paras. (v.) and (vi.) of para. 2 of the Scheme. I find that there was in the mudstone minute particles of free silica sporadically scattered through the mass ranging up to about 8 per cent. of the total content. There were no lenticles.

The case turned principally upon the construction of the Various Industries (Silicosis) Scheme, 1931, and the Various Industries (Silicosis) Amendment Scheme, 1934.

The Various Industries (Silicosis) Scheme, 1931 (St. R. & O. 1931, No. 342), dated April 30, 1931, and made by the Secretary of State in pursuance of the powers conferred upon him by s. 47 of the Workmen's Compensation Act, 1925 (2), as extended by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, provided as follows:—

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(1) (1935) 28 B. W. C. C. 358, 364.

(2) Workmen's Compensation Act, 1925, s. 47, sub-s. 1: "The Secretary of State may by scheme provide for the payment of compensation by the employers of workmen employed in any specified industry or process or group of industries or processes involving

"2. *Application of Scheme.*—This Scheme shall apply to all workmen employed at any time on or after the commencement of this Scheme in any of the following processes:—

(i.) mining and quarrying of silica rock:

For the purposes of this Scheme 'silica rock' means quartz, quartzite, ganister, sandstone, gritstone and chert, but does not include natural sand or rotten rock.

(ii.) drilling and blasting in silica rock, in or incidental to the mining or quarrying of other minerals;

(iii.) in addition to and not in derogation of the provisions of the foregoing paragraph, the following processes:—

(*a*) drilling or blasting in stone in any sinking pit or staple pit or in any cross measure drift or stone drift or other strait or narrow working in any coal mine, or any handling or moving of stone at the working places where these processes are carried on;

(*b*) operating or assisting in the operation of any power-driven machine used for drilling, cutting, ripping or breaking stone in any coal mine.

Provided that the employer shall not be liable under this paragraph in any case where he proves to the satisfaction of the County Court Judge or other arbitrator that the workman has not, during the employment to which the disease is alleged to be due, been exposed to the dust of silica rock.

(iv.) sawing, planing, dressing, shaping, cutting or carving of silica rock;

(v.) breaking, crushing, grinding, sieving, mixing or packing of silica rock, or of dried quartzose sand or any dry deposit or dry residue of silica or any dry admixture containing such materials; or any process ancillary thereto;

(vi.) handling or moving of silica rock, or of dried

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exposure to silica dust—(*a*) who are certified in such manner as may be prescribed by the scheme to have suffered death or total disablement from the disease known as fibroid phthisis or silicosis of the lungs (in this section referred to as silicosis) or from that disease accompanied by tuberculosis; . . . ."

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quartzose sand or any dry deposit or dry residue of silica, in or incidental to the processes mentioned in the foregoing paragraphs ;

(vii.) breaking, crushing or grinding of flint or materials containing ground flint ; or handling, moving, sieving, mixing or packing of broken, crushed or ground flint or materials containing such flint.

(viii.) in the undermentioned trades, the processes specified and those processes only, namely :—

Foundries and metal works :—

(*a*) in works engaged in the manufacture of steel or in steel foundries ; crushing or grinding of silica rock or any handling incidental to such crushing or grinding, or crushing or grinding of bricks or other articles containing not less than 80 per cent. total silica (SiO_2) ;

(*b*) freeing of steel castings from adherent sand or other siliceous substance, excepting work done upon the foundry floor ;

(*c*) sandblasting of metal or articles of metal by means of compressed air with the use of quartzose sand or crushed silica rock or flint ;

The getting and manipulation of granite (*including any igneous rock*).

The dressing of stone by masons for building, civil engineering, or monumental purposes, but not kerb dressing if the workman is wholly or mainly employed on such work.

Potteries :—

(*a*) the milling of flint or crushing or grinding of silica rock or dried quartzose sand ;

(*b*) any process in or incidental to the manufacture of china or earthenware including sanitary earthenware, electrical earthenware, and earthenware tiles, up to and including the preparation for glazing but excluding underglaze decorating, and modelling and mould-making where these processes are carried on in separate rooms ;

(*c*) polishing, sorting or grinding on a power driven wheel in connection with the grinding of glost ware, and tile-slabbing.

Tin Mines:—

(*a*) any operation underground;

(*b*) breaking or crushing of the ore or the containing rock above ground or any handling or moving incidental thereto.

Provided that nothing in this Scheme shall apply to the employment of a workman in any process included in the Refractories Industries (Silicosis) Scheme, 1931, the Metal Grinding Industries (Silicosis) Scheme, 1931, or the Sandstone Industry (Silicosis) Scheme, 1931."

The Various Industries (Silicosis) Amendment Scheme, 1934 (St. R. & O. 1934, No. 1155), dated October 22, 1934, and made by the Secretary of State, provided as follows:—

"In pursuance of the powers conferred on me by s. 47 of the Workmen's Compensation Act, 1925, as extended by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, I hereby direct that the Various Industries (Silicosis) Scheme, 1931, shall be amended and take effect as if the processes specified in para. 2 of the said Scheme as the processes to employment in which the Scheme shall apply, included the following, namely:—

Any operation underground in any coal mine.

This Order applies to workmen employed in any such operation at any time on or after the date of this Order."

The county court judge held that the applicant was entitled to succeed. He was exposed to silica dust in that when the mudstone was disintegrated the minute particles of free silica were released and subsequently inhaled by him. It would be strange if the applicant could not receive compensation because in precise geological terminology the mudstone was not silica rock, although containing the harmful substance contained in the latter. The county court judge held that the Various Industries (Silicosis) Amendment Scheme, 1934, conferred new rights on workmen, and that, in the absence of specific direction to the contrary, it should not be inserted in the Various Industries (Silicosis) Scheme, 1931, as an addition to sub-para. (iii.) of para. 2 immediately preceding the proviso, but should be inserted in such a place as not seriously to reduce the benefits conferred. The present applicant came within the Scheme as amended, and he awarded him 30*s*. per week to commence on April 19, 1935, and to continue until duly ended, diminished or reduced.

The employers appealed.

Edgar Dale (*Sutton-Nelthorpe* with him) for the appellants, the employers. The question in this case is whether the employers are entitled to rely upon the proviso to sub-para. (iii.) of para. 2 of the Scheme of 1931 (Order No. 342) as an answer to the claim made by the workman for compensation. The county court judge has held that the employers are not entitled to rely upon the protection of that proviso, and that the Scheme of 1934 (Order No. 1155) must be read as if it were inserted as a new sub-paragraph in para. 2 of the Scheme of 1931. It is submitted that the Scheme of 1934, which refers exclusively to "any operation underground in any coal mine" ought to be inserted in sub-para. (iii.) of para. 2 of the Scheme of 1931 after (*b*) and before the proviso, in which case the employers would be able to claim the benefit of the proviso. The only sub-paragraph of para. 2 of the Scheme of 1931 which deals with coal mines is sub-para. (iii.). That sub-paragraph was not in the Various Industries (Silicosis) Scheme of 1928 (St. R. & O. 1928, No. 975), para. 2 of which was very similar in form to para. 2 of the Scheme of 1931. Sub-para. (iii.) was brought into existence by the Various Industries (Silicosis) Amendment Scheme, 1930 (St. R. & O. 1930, No. 1095), and the Order expressly provided that it was to follow sub-para. (ii.) of para. 2, and the employers were at the same time given the protection of the proviso. It was intended by the Order 1155 of 1934 to amend the Scheme of 1931 by substituting the words "any operation underground in any coal mine," which are quite general and have no reference to silica dust, for clauses (*a*) and (*b*) of sub-para. (iii.) of para. 2, and to leave the protection given to employers by the proviso still in existence. The Various Industries (Silicosis) Amendment Scheme, 1935 (St. R. & O. 1935, No. 69), which still further amends the Scheme of 1931 (Order No. 342), is very illuminating, because it expressly provides that "the following trade and process shall be included in sub-para. (viii.) of para. 2:—'*Hæmatite Iron Ore Mines*:—any operation underground.'" Thus expressly specifying where in the Scheme of 1931 the Amending Scheme of 1935 should go. If the Amending Scheme of 1934 (Order No. 1155) were inserted in the Scheme of 1931 (Order No. 342) in any other position than in sub-para. (iii.) before the proviso it would mean that the proviso would be made of no effect and therefore be impliedly repealed. This would be contrary to the ordinary canons of construction: see Maxwell on Interpretation of Statutes, 7th ed., pp. 136, 144, where it is stated that "the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it." And again: "But repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason." Lord Bramwell said in *Great Western Ry. Co.* v. *Swindon and Cheltenham Ry. Co.* (1): "We ought not to hold a sufficient Act repealed, not expressly as it might have been, but by implication, without some strong reason." A. L. Smith J. said in *Kutner* v. *Phillips* (2): "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, 'Leges posteriores [priores] contrarias abrogant' (3) applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied." If the Amending Scheme of 1934 is construed strictly it will bring within the ambit of the Scheme of 1931 any operation underground in any coal mine apart altogether from involving the workmen to exposure to silica dust, and therefore the Scheme would be ultra vires of the Secretary of State, because by s. 47 of the Workmen's Compensation Act, 1925, he is only empowered to make Schemes providing for the payment of compensation to workmen employed in industries or processes involving exposure to silica dust. When Lord Atkin made his observations in *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (1), that "It is satisfactory to find that by the Scheme of 1934, so far as collieries are concerned, the technicalities have been swept away, and it is now only necessary to consider whether the disease is due to employment in any operation underground" he did not have this case in his mind.

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(1) (1884) 9 App. Cas. 787, 809.
(2) [1891] 2 Q. B. 267, 271.
(3) 2 Inst. 685.

John Neal for the respondent, the workman. The definition of "silicosis" given in s. 47 of the Workmen's Compensation Act, 1925, has been altered by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, and the definition "fibrosis of the lungs due to silica dust" has now been substituted for the original definition. Therefore, every person who is certified as suffering from silicosis is thereby certified to be suffering from fibrosis of the lungs due to silica dust. "Silica dust" is not necessarily the same as "the dust of silica rock." A workman must have been exposed to silica dust before he can be certified as suffering from silicosis. Under para. 4 of the Scheme of 1931 (Order No. 342) a workman must prove, in order to claim compensation, not only that he is suffering from silicosis, but also that the disease is due to employment in the processes mentioned in para. 2 of the Scheme. The evidence of Dr. Platt in this case is that the disease from which the applicant was suffering was due to his employment; that it could not arise in any other way, and that the applicant was thereby totally incapacitated. Full effect should be given to the Scheme of 1934 (Order No. 1155), and it ought to be inserted in the Scheme of 1931 (Order No. 342), where it will receive full effect. It was intended to give new rights to workmen, and that there should be a new process to which the Scheme of 1931 should apply—namely, "any operation underground in any coal mine." The Scheme of 1934 ought

(1) 28 B. W. C. C. 362.

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therefore to be inserted in para. 2 of the Scheme of 1931 as a new sub-paragraph. If it is inserted in sub-para. (iii.) of para. 2, as contended for by the other side, the effect will be to add words to Order 1155 of 1934 which are not there—namely, the proviso to sub-para. (iii.), with the result that Order 1155 of 1934 will be emasculated by the proviso. The Amending Order 1155 of 1934 amends the whole of the eight processes set out in para. 2 of Order 342 of 1931. The fact that in Order 1155 of 1934 there is no express provision as to where that Order shall be inserted in the Scheme of 1931, whereas it was expressly stated in Order 1095 of 1930 where it should go in the Scheme of 1928, lends support to the contention that it was intended that it should be inserted in para. 2 of the Scheme of 1931 as a new sub-paragraph. The argument which is now being put forward was certainly in the mind of Lord Atkin when he made his observations in *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (1), and those observations are very strong in support of my contention.

GREER L.J. This is an appeal from an award of a county court judge, and it raises a question of very great difficulty, because of the somewhat inartistic wording of the amendments to the Scheme upon which the liability of the employers in question depends from time to time in regard to these matters. The question has been very ably argued, but we have come to a conclusion different from that of the learned county court judge in this respect, notwithstanding his lucid and clear judgment, namely, that the employers, the mine-owners, ought to succeed in this appeal, because they are entitled, under the Scheme, to say that they have established that the case comes within the protection of a proviso which is inserted in the Scheme for the protection of the employer.

The facts, as found by the learned judge, are not in dispute. The workman, on April 19, 1935, suffered from an incapacity from silicosis due to something that happened in the course of his working in the mine for the appellant company. From the finding in the award, that was the kind of injury that would be covered by the provision in reference to the liability of the employers in respect of industrial diseases. What we have to determine, on the facts found by the learned county court judge, is from what the respondent workman was in fact suffering. The learned judge stated his finding in this way, and I think it is of some importance that I should read the words in which he states his findings of fact. He says on the first page of his judgment : " The applicant Wragg was employed by the respondents for forty-one years up to April 19, 1935, the last twenty years of this being spent in underground work, heading and ripping on alternate days. This work entailed driving through a stone termed by the geologist mudstone, and in addition to the use of pick and crowbar, blasting was carried out. I am satisfied that the applicant was constantly exposed to dust." He does not there necessarily mean silica dust, but simply dust. " For the last few years of his life the applicant has experienced what he called 'tightness' and finally ceased work on April 19, 1935. He was examined by the Medical Board appointed for the purpose, and on June 21, 1935, was duly certified as suffering from silicosis and totally incapacitated. The commencement of the disablement was certified as April 19, 1935. After hearing Dr. Platt I was satisfied that the applicant was still totally incapacitated ; further, that the silicosis was due to the nature of his employment with the respondents, and that the disease could not have been contracted in any other way." The other passage I want to refer to is on the next page of his judgment : " Professor Gilligan was called before me, and I am satisfied on his evidence that the applicant was not exposed to the dust of silica rock. In this connection I have taken into account the following passage from Lord Atkin's speech in *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (1) : 'It is not necessary that the " dust of silica rock " should be the dust of silica rock which is being at the time reduced to dust by the workman's operations. The workman was in fact being exposed to the dust of silica rock, viz., the free silica in the shale which is truly the dust of quartz.' I am also satisfied,"

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(1) 28 B. W. C. C. 362.

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says the learned county court judge, after this quotation, "that the material in which the applicant worked was not silica rock or dried quartzose sand or dry deposit or dry residue of silica or a dry admixture containing such materials, and that the applicant did not handle or move such materials. That is to say, I find that the material worked in is not within the lists contained in sub-paras. (v.) and (vi.) of para. 2 of the Scheme. I find that there was in the mudstone minute particles of free silica sporadically scattered through the mass ranging up to about 8 per cent. of the total content. There were no lenticles." The reference to lenticles means this. In mines and in strata which are otherwise free from silica rock there may be very narrow veins of silica rock running through strata composed of rock of a different kind, and the question arose for decision at one time whether, when silica dust arose through the operations of the workers in the mine on rock which contained these narrow veins and silica dust was thereby conveyed to the lungs of a miner, that was within the Scheme. It was held in the case of *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (1), to which I have already referred and to which I shall have to refer later, that that dust coming from those veins was the dust of silica rock.

Those being the facts as found by the learned judge, he had to apply, and so have we, the law on the subject. The law on this question is to be found partly in the Workmen's Compensation Act, 1925; but, so far as is material to this case, in the Scheme which the Secretary of State has made providing for the payment of compensation by the employers of workmen in any specified industry or process or group of industries or processes, involving exposure to silica dust. The statute itself does not impose any liability at all, but it gives the Secretary of State power, by means of what I have called delegated legislation, to provide for the payment of compensation by the employers of workmen in specified industries or processes, or groups of industries or processes, involving exposure to silica dust. So that the Scheme must be a Scheme providing for payment of compensation to workmen who are engaged

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in processes or industries involving exposure to silica dust. I suppose "silica dust" means, at any rate, some quantity of fine particles of dust which are so fine that they can, in the process of the workman's breathing, find their way to his lungs and so cause the disease known as silicosis. The Scheme that we have to consider is the Scheme of 1931 as amended by an addition to it made in 1934. The 1931 Scheme is the matter to be considered in the first instance, because we have to say what is the effect of the amendment or addition made to it by the Scheme of 1934. So far as the unaltered Scheme is concerned, it seems to me quite apparent, on reading para. 2, that the authors of the Scheme had in mind that they were preparing a Scheme for the purpose of enabling workmen to succeed in claims against their employers where they suffered from silicosis by reason of dust which arose from the crushing of silica rock, because if we look at the various lists of employments and processes, they are nearly all specifically and expressly related to the crushing of silica rock. Take, for example, Nos. (v.), (vi.) and (vii.) of the processes mentioned in para. 2 of the Scheme. No. (v.) is "breaking, crushing, grinding, sieving, mixing or packing of silica rock, or of dried quartzose sand or any dry deposit or dry residue of silica or any dry admixture containing such materials; or any process ancillary thereto"; and (vi.) is: "handling or moving of silica rock, or of dried quartzose sand or any dry deposit or dry residue of silica, in or incidental to the processes mentioned in the foregoing paragraphs." Then there are further processes mentioned, all of which seem to me to indicate that what the Scheme is dealing with is the dust arising from the operations of labour on silica rock or on rock which contains a large proportion of silica rock. It is quite true that there is at the end of para. 2, in reference to tin mines, the statement, "any operation underground." That is explained by the fact that it may be treated as well known that you cannot mine for tin without, in some way or other, dealing with silica rock and crushing it so that there will be dust arising from the crushing of the silica rock. It is necessary to consider the early part of the paragraph, which contains a definition of what is silica rock for the purposes of the Scheme. It is in a curious place; it is not in the usual place where one finds a definition clause. It is stated in this way; para. 2 says: "This Scheme shall apply to all workmen employed at any time on or after the commencement of this Scheme in any of the following processes: (I.) mining and quarrying of silica rock." Then underneath that is this definition: "For the purposes of this Scheme 'silica rock' means quartz, quartzite, ganister, sandstone, gritstone and chert, but does not include natural sand or rotten rock." I suppose "rotten rock" means friable rock, rock which immediately crushes when you touch it. Then there follow in that paragraph of the Scheme a second and a third sub-paragraph; the third sub-paragraph is a paragraph which relates solely to what is done in a coal mine, and it is in these terms: "In addition to and not in derogation of the provisions of the foregoing paragraph, the following processes:—(*a*) drilling or blasting in stone in any sinking pit or staple pit or in any cross measure drift or stone drift or other strait or narrow working in any coal mine, or any handling or moving of stone at the working places where these processes are carried on; (*b*) operating or assisting in the operation of any power-driven machine used for drilling, cutting, ripping or breaking stone in any coal mine." Both those processes are processes which are described as processes in a coal mine, and they cause considerable difficulty in the way of an applicant proving his case, because he might have to prove that the dust which injured him came from the drilling or blasting in stone in a sinking pit or staple pit or in a cross measure drift or stone drift or other strait or narrow working. It might, and I have no doubt did, occasion to applicants very great difficulty in getting their case on its legs (if I may use the expression), because they could not get evidence that the dust which injured them came from the processes as described in sub-para. (iii.), and therefore it may well have been considered desirable to relieve them of that difficulty by means of a different Scheme. But sub-para. (iii.) is followed by a proviso which, so far as the position of the wording is concerned, is miscopied at p. 796 of the 29th ed. of Mr. Willis's admirable book on the subject. It ought to be clear from the situation that the proviso is a proviso upon sub-para. (iii.) and not upon any other part of para. 2, that is to say, the sub-paragraph which relates to silicosis due to the working in a mine. The proviso reads : " Provided that the employer shall not be liable under this paragraph "—" this paragraph " means sub-para. (iii.)—" in any case where he proves to the satisfaction of the County Court Judge or other arbitrator that the workman has not, during the employment to which the disease is alleged to be due, been exposed to the dust of silica rock." I understand the learned county court judge's judgment to mean that it was established to his satisfaction by the employers that the workman had not, during the employment to which the disease was alleged to be due, been exposed to the dust of silica rock. I think it is conceded, and must necessarily be conceded, that unless the 1934 Scheme wipes out that proviso and repeals it so far as it relates to working in a coal mine, then the appellant company are entitled to succeed.

Our attention has been called to the history of this matter as it is embodied in the various alterations of the Scheme in force before the Scheme of 1931 was made ; but, for my part, I have not been able to get any assistance from that account of how the Scheme was altered from time to time in deciding the question that we have to decide in this case. In 1934 by Order No. 1155 the Minister provided as follows : " In pursuance of the powers conferred on me by s. 47 of the Workmen's Compensation Act, 1925 "—which is the section to which I have referred—" I hereby direct that the Various Industries (Silicosis) Scheme, 1931, shall be amended and take effect as if the processes specified in para. 2 of the said Scheme as the processes to employment in which the Scheme shall apply, included the following, namely :—any operation underground in any coal mine." The appellants' contention is that the only way in which effect can properly be given to that amendment is to substitute in sub-para. (iii.) of para. 2 for sub-sub-paras. (*a*) and (*b*), the words " any operation underground in any coal mine." They suggest that that will give very substantial relief to the workman, because he will not have to prove any of the things which it was necessary for him to prove if he was relying upon a Scheme under sub-para. (iii.) relating to working in the mine. But the appellants say that if that amendment is put in its right and proper place as one of the processes to which para. 2, sub-para. (iii.), is to apply, it ought to be put in the earlier part of the list and before the proviso, because it is not to be assumed that a protection which was inserted by this delegated legislation in the list of processes for the very purpose of protecting owners against the wide liability that would otherwise be incurred, would be taken away without express words: that it is necessary to find, in order to take away that protection, express words in the statute taking it away, and that if the amendment is put, as Mr. Neal for the respondent contended, anywhere else in para. 2, so that the proviso does not apply to it at all, this extraordinary result is produced, that although in most of the processes, if not all of the processes, it is necessary to show that the dust which has done the damage has come from the operations on silica rock, yet in the case of any operation underground in a coal mine it is not necessary to inquire in the very least where the dust comes from, provided the fact is established that it has happened during an operation underground in any coal mine. It seems to me that it would be wrong in principle to say that an alteration of this sort can effect the repeal of a proviso expressly inserted in the Scheme for the protection of the employers. The words in the Order of 1934 are general words, and they ought not to be interpreted as effecting by implication a repeal of the protection which is provided by express words in the delegated legislation of 1931. But, in addition to that, another difficulty in Mr. Neal's way is this. Supposing the amendment is not put in sub-para. (iii.) of para. 2 in substitution for what is in sub-para (iii.), but is put in after the proviso, probably at the end of the list of processes, the result might be this, that where a workman proves that he got his silicosis from particles of silica coming from mudstone while he was working in a

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narrow place then the employer will obtain the benefit of the proviso, whereas, if he was not working in a narrow place but was working somewhere else, the employer would not have the benefit of the proviso. The insertion of this amendment in any other place than as a part of sub-para. (iii.) creates, in my judgment, such serious difficulties that one cannot suppose that that is the effect of the legislation involved under Order No. 1155 of 1934.

There is only one other matter with which I desire to deal, and that is the reliance that was placed, and rightly placed, by Mr. Neal upon the observations made in the course of his speech by Lord Atkin in the case of *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (1) In that case, which related to the claim of an applicant which had to be determined under the Order of 1931, and in respect of which the Order of 1934 had no application, the only question for determination was whether what are called lenticles—those are the narrow veins of which I have spoken—were silica rock within the meaning of the Order of 1931. The ultimate Court of Appeal, the House of Lords, held that these narrow veins of rock mixed up with other rock were, none the less because they were narrow and because they were small, silica rock, and therefore the dust which came from them was dust coming from silica rock, and also that the liability of the employer was not confined to cases in which the work of the workman himself caused the dust which in course of time resulted in the silicosis of which he complained. Those were the points to be decided, but in the course of the argument it was probably mentioned by some one that such questions were not likely to occur in the future by reason of the fact that the 1934 Order had been made, and would, in the future, be applied to silicosis acquired in coal mines. In the course of his speech Lord Atkin said this (2): "It is satisfactory to find that by the Scheme of 1934, so far as collieries are concerned, the technicalities have been swept away, and it is now only necessary to consider whether the disease is due to employment in any operation underground." If that were taken as a literal statement of the effect of the Scheme of 1934, it would support the judgment of the learned county court judge, but it has to be remembered that the question as to the effect of the Order of 1934 was not argued and was not before the Court, and that there was no question for decision by the House of Lords which turned upon the true interpretation of the words of the Scheme of 1934. In addition to that, it may very well be that the explanation of the words is this, that the learned Lord, in the course of his speech, was considering the question of the technical difficulties to which a workman was exposed when he attempted to prove his case under sub-para. (iii.) of para. 2 of the Scheme of 1931, and that the passage means no more than this, that those difficulties have now gone, leaving the question as to whether the proviso would not still be operative if the employer was able to prove the facts which bring the proviso into operation. I am not sure that that is not putting too much of a gloss upon the words that Lord Atkin used; I am inclined to think that he had in his mind then the view which has been put forward by Mr. Neal on behalf of the workman, that if it was proved that a man suffering from silicosis had been working in the mine, he brought himself within the Scheme and could recover, because he was suffering from silicosis by reason of some operation underground in a coal mine. Whether that is right or whether it is not is a matter which will have to be considered by the House of Lords when the question arises in which it is necessary to determine what was the true effect of the amendment made by the Scheme of 1934 upon the lists of processes which appeared in para. 2 of the earlier Scheme.

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(1) 28 B. W. C. C. 358, 362.

(2) Ibid. 362.

I should further only point out that in the 1931 Scheme there seems to be a kind of division in the list of processes. First of all, we get processes mentioned in sub-paras. (i.), (ii.) and (iii.), then a proviso, and then a number of other processes. It is almost as if there were two lists of processes, and one had to determine at the end of which of these two lists the amending words of the Order of 1934 ought to be inserted.

For the reasons which I have given I have come to the

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conclusion that the argument for the appellants is right, that the appeal should succeed, and that the order of the Court should be that there should be an award in favour of the employers, with the usual consequences both as regards the appeal and as regards the proceedings in the county court.

Slesser L.J. I am of the same opinion. By the Order of the Secretary of State No. 975 of 1928, made under s. 47 of the Workmen's Compensation Act, 1925, provision was made with regard to workmen suffering from silicosis. In that Order, by para. 2, for the most part the processes were concerned with working, in one way or another, in silica rock, and there was at that time no special provision made in regard to working in coal mines. By an amending Order of 1930, however, that omission was rectified. Before the passing of the 1930 Order it would have been necessary for a man working in a coal mine, if he were to recover compensation from his employer, to show that he fell within one of the different there stated processes, all of which, as I have said, with certain specified exceptions, such as working in tin mines, were dealing with working in silica rock. By the 1930 Order, which now finds expression in para. 2, sub-para. (iii.), of the Order of 1931 (to which I will refer in future as " the 1931 Order "), the workman was given this advantage, that where he was working in certain specified processes, not necessarily involving working in silica rock, in stone of a certain kind, in certain measures, and operating in certain ways, all of which are stated in sub-para. (iii.), he was entitled to be treated as a workman engaged in a process which might produce a right to compensation unless the employer should prove " that the workman has not, during the employment to which the disease is alleged to be due, been exposed to the dust of silica rock." In other words, the workman, who formerly had to prove affirmatively that the process was one which fell within the earlier definitions contained in the Order of 1928 or he could not succeed, could now succeed if he could show that, working in the measures or drifts or narrow workings, or doing operations contemplated in sub-para. (iii.),

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he was working in stone, unless the employer could show that the disease was not due to the workman being exposed to the dust of silica rock. So that the burden of proof that the man was not working in silica rock was, substantially, shifted from the workman to the employer when the workman was working in a coal mine in the specified processes. That was, therefore, an advantage to the workman, but it was an advantage limited by the proviso for the protection of the employer. The question which we have to consider in this case is whether that protection there given to the employer to say that the workman, notwithstanding that he comes within sub-para. (iii.), ought not to succeed because he, the employer, can show that the workman has not during the employment to which the disease is alleged to be due been exposed to the dust of silica rock, is altered by the operation of the 1934 Order No. 1155.

The sole question really in this case is one of construction, whether that new Order of 1934 has or has not taken away the protection of the employer under the proviso to sub-para. (iii.) of para. 2 of the 1931 Scheme, or whether it has abrogated that paragraph altogether. The difficulty arises in this way, the 1934 Order instead of, in terms, either saying that the conditions contained in sub-sub-paras. (*a*) and (*b*) of sub-para. (iii.) of para. 2 should be repealed but that the proviso should stand, or, on the other hand, saying that the whole of sub-para. (iii.), including the proviso, is repealed, so that coal mining is in the same position as, say, tin mining, mentioned in sub-para. (viii.) without any condition or proviso, merely said that the Scheme of 1931 should be amended and take effect as if the processes specified in para. 2 of the Scheme included "any operation underground in any coal mine." The language of the new Scheme is so ambiguous as to be capable at least of argument that it bears two constructions. In my view, however, the construction for which Mr. Dale contends must be the right one. It is to be noted, in the first place, that the new Order of 1934 is said to be an amendment; the 1931 Scheme "shall be amended and take effect as if the processes specified in para. 2 of the said Scheme as the

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processes to employment in which the Scheme shall apply, included the following." So that, on the face of it, it is not a repeal of the whole of sub-para. (iii.), and, for reasons which my Lord has stated, if this amendment be not regarded as a repeal of the existing provisions in sub-para. (iii.), great difficulties—I might even call them absurdities—arise, for the result would be that if it be taken that the 1934 Order applies to any operation underground in any coal mine, and that is to be the process, if sub-para. (iii.) is still to stand, a workman who is employed in any coal mine in any process not mentioned in sub-para. (iii.) can obtain compensation whether he works in silica rock or not, so long as he is exposed to silica dust, whereas a workman in any of the processes mentioned in sub-para. (iii.) and which so far have been favoured, subject to the burden on the employer of showing that the workman was not working in silica rock, is still subject to the proviso to sub-para. (iii.), and the employer could still defeat his claim. That may, I think, be fairly characterized as an absurdity. The only way of escape from that absurdity is to assume that sub-para. (iii.) as a whole has been repealed. There is no mention of repeal in the Order, as I have said, but only an amendment, and the law, as was long ago said, leans against repeals by implication. I see no need here to imply such a repeal. The language seems to me fully satisfied in the manner which my Lord stated, thus: In order that the workman may succeed under the Scheme of 1931, he must show that he is drilling or blasting in certain places—I say that compendiously to include all those mentioned in sub-sub-para. (*a*) of sub-para. (iii.)—or in certain operations, otherwise he is no better off than he was in 1928. I think that this language " any operation underground in any coal mine," removes those limitations of area and process and makes it sufficient for him to show that he is engaged in any operation in any coal mine exposed to silica dust, and then he is prima facie entitled to compensation unless the employer can succeed under the proviso in showing that he is not exposed to the dust of silica rock.

Although I say it with great hesitation, my own inclination

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is to think that that was the view which Lord Atkin took in *Morgan* v. *Amalgamated Anthracite Collieries, Ld.* (1), when he says: "It is satisfactory to find that by the Scheme of 1934, so far as collieries are concerned, the technicalities have been swept away." I agree with my Lord that those words in themselves are capable of a much wider meaning. The reason why I think Lord Atkin was applying his mind to that matter is because later he deals (2) with narrow workings and discusses strait or narrow workings. That seems to be the subject-matter of the technicalities which were before his mind. At any rate that is a possible view. In any case, as my Lord says, the observation is obiter dictum: it was not essential to the decision in that case. To my mind it is impossible, for the reasons I have stated, to give these words the wide meaning which has been contended for.

There is one other matter I should like to mention. Mr. Dale has sought to draw our attention to an Order made in 1935, after the making of the Order of 1934, and he points out that there, when it was intended generally, as Mr. Neal contends, to free some process altogether from conditions with regard to exposure to silica dust, as in the case of hæmatite iron-ore mines, and they were intended by the Order to be treated like tin mines, then it was expressly said that this should be by way of addition to sub-para. (viii.) of para. 2, which is one in which there is no proviso for the protection of the employer. I had some doubt as to how far this proleptic method of interpretation was justified, but having regard to the Orders as a whole, and having regard to the fact that the 1935 Order is stated to be an amendment of the earlier Orders, that therefore they are to be further amended and take effect as amended by this one, although, by itself, it is not conclusive, I am not prepared to say it should be excluded altogether from consideration. At any rate, if it is used as an illustration of Mr. Dale's argument, it shows that, had the Secretary of State intended to apply this Order to any operation underground in any coal mine irrespective of any proviso in favour of the employer then existing, he could very well have done

(1) 28 B. W. C. C. 362.

(2) Ibid. 364.

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it by specifying where the amendment was to be inserted in the 1931 Scheme. He has not thought fit to do so. All the absurdities and difficulties which I have mentioned are, however, avoided by giving the amendment the interpretation for which Mr. Dale contends—namely, that it must be inserted in sub-para. (iii.) of para. 2, which will then read as follows: "In addition to and not in derogation of the provisions of the foregoing paragraph, the following processes:—any operation underground in any coal mine. Provided that the employer shall not be liable under this paragraph in any case where he proves to the satisfaction of the county court judge or other arbitrator that the workman has not, during the employment to which the disease is alleged to be due, been exposed to the dust of silica rock." If that be the right interpretation, the learned county court judge has held here that, in such a case, the applicant, although beyond all cavil totally incapacitated by reason of his employment, would fail to get compensation. So there is no need here to send the matter back to him. It is agreed that once the proviso applies, as I think it does apply, the applicant must fail. This appeal should succeed.

SCOTT L.J. I agree with the judgments which have been delivered and do not propose to add much.

The chief question is, What is the proper interpretation of the Order of 1934, which introduced into the 1931 Scheme the processes described as "Any operation underground in any coal mine"? The Order made by the Home Secretary in 1934 gives no indication as to where in para. 2 of the 1931 Scheme that insertion is to be made or as to what effect it is to have on the existing provisions contained in para. 2. That question has been left to the Court to decide. In my view, when that amendment is put into the Order of 1931 it will be found that unless it is put into sub-para. (iii.) the result is a hopeless muddle: one cannot say what effect it is to have on the processes described in sub-para. (iii.): one does not know whether it is to be treated as on the same footing as tin mines; everything is left vague. On the other hand, if the amendment is put into sub-para. (iii.) it is appropriate in that particular place and can be interpreted quite easily and reasonably on one assumption—namely, that it is treated as superseding the two sub-clauses of sub-para. (iii.), (*a*) and (*b*). If it were put into sub-para. (iii.) as a further sub-clause (*c*), it would make the drafting an absolute absurdity. If all operations in a coal mine underground are to be included in the Scheme it is ridiculous to describe certain specific operations. In my view, the references to all the underground operations contained in (*a*) and (*b*) of sub-para. (iii.) must be treated as superseded by the amendment and repealed. It may be that the definition of "mines" in the Coal Mines Regulation Act of 1911, which includes a sinking pit, is intended to be understood when the word "mine" is used here, but that does not arise and we need not consider it. I therefore arrive at the conclusion that (*a*) and (*b*) of sub-para. (iii.) of para. 2 are deleted and replaced by the new words of the 1934 Order.

If there is one principle of Statute interpretation in regard to amending Acts which is clear it is that rights will not be taken away by implication unless the language makes it impossible to give effect to the amendment in any other way. Here the proviso to sub-para. (iii.) of para. 2 of the 1931 Scheme gave the employer an absolutely definite right. It would be a wrong interpretation of the 1934 Order, in my opinion, to treat it as having any effect at all on the right that was given the employer by that proviso. Therefore, in my opinion, that proviso must be treated as still in the Order. The method of drafting of the Order of 1930, which was repeated in the Order of 1931, is, I think, intelligible, having regard to the subject-matter. It looks as if the policy intended to be followed in these Orders was to say that where the rock that is being handled and creating dust contains a large percentage of silica, as in the case of the rocks named in the definition clause of "silica rock," then the workman shall have the right to compensation from his employers as soon as he proves that the silicosis from which he is suffering has been caused by his employment. On the other hand, where the work that is being done is in other types of stone,

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where the percentage of silica is much lower, then it looks as if the Secretary of State had intended to give the employer the protection of the proviso. That is a reasonable policy to apply and would explain why, in the proviso, the language is " exposed to the dust of silica rock " as distinct from " exposed to silica dust." If it were " exposed to silica dust " the proviso would really add nothing, because ex hypothesi the man has to prove that the silicosis from which he is suffering has been caused by exposure to silica dust. Unless the phrase " dust of silica rock " is treated as meaning something different from " silica dust " the proviso has no meaning; a sensible meaning is given to the phrase as soon as it is read as saying that if the employer proves that the man has not been dealing with silica rock, as defined in sub-para. (i.), then he shall not have the burden of the proof of silicosis put upon him. In that way you get an intelligible result. I am expressing no opinion from a social point of view whether or not it would be desirable to alter that interpretation. I am merely speaking of what seems to me to be the effect of this delegated legislation.

For these reasons, I agree that the appeal must be allowed. I desire, however, to make a further observation. The drafting of this Scheme of 1931 and of the amendments seems to me to be thoroughly bad, and I should like to take this opportunity of suggesting that the method of securing good draftsmanship of delegated legislation which was recommended by the Committee on Ministers' Powers (over which I had the honour to preside) should be adopted at an early date. In the Report, Command Paper 4060 of the year 1932, at p. 49, in para. 10, we made proposals for the supervision of the drafting of delegated legislation by the Parliamentary Draftsman's Office, as there are competent counsel on the staff of that Office. I believe that until something of that kind is done the kind of confusion which results from the present method of drafting is bound to continue.

Appeal allowed. (1)
Award in favour of appellants.

(1) Leave was granted to the workman to appeal to the House of Lords.

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Solicitors for appellant company: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes, Cockburn & Co., Rotherham.*

Solicitors for respondent workman: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

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W. V. BOWATER AND SONS, LIMITED *v.* DAVIDSON'S PAPER SALES, LIMITED.

Appeal—County Court—Mayor's and City of London Court—Appeal to Court of Appeal—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *ss.* 148, 149—*London (City) Small Debts Extension Act,* 1852 (15 *Vict. c. lxxvii.*), *s.* 78—*Mayor's Court of London Procedure Act,* 1857 (20 & 21 *Vict. c. clvii.*), *ss.* 4, 8, 43—*Supreme Court of Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *ss.* 18, 45—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *ss.* 156, 185, 186—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 42, *sub-s.* 14—*Mayor's and City of London Court Act,* 1920 (10 & 11 *Geo.* 5, *c. cxxxiv.*), *ss.* 1, 2, 7, 9, 11—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 24*a*—*Administration of Justice (Appeals) Act,* 1934 (24 & 25 *Geo.* 5, *c.* 40), *s.* 2.

An appeal lies to the Court of Appeal from the Mayor's and City of London Court in cases within the county court jurisdiction.

Observations by Slesser L.J. on the jurisdiction of the Court of Appeal to entertain such appeals in cases outside the county court jurisdiction.

APPEAL from a decision of the Common Serjeant sitting in the Mayor's and City of London Court.

The plaintiffs, W. V. Bowater & Sons, Ld., brought an action in the High Court against Davidson's Paper Sales, Ld., to recover the sum of 30*l.* 4*s.* 10*d.*, the price of goods sold and delivered. The action was remitted to the Mayor's and City of London Court.

The defendants, by their defence, said that there was no privity of contract between them and the plaintiffs; that the contract for the purchase of the goods was not made with them, but was made by the plaintiffs with C. Davidson & Sons, Ld., of Mugiemoss and Bucksburn Paper Mills, Bucksburn, Aberdeenshire.

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The defendants were a subsidiary company of C. Davidson & Sons, Ld., and acted as their representatives in England.

The Common Serjeant held that the goods were ordered by the defendants, Davidson's Paper Sales, Ld., upon their own credit, and he accordingly gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

Patrick Devlin for the appellants.

W. H. Moresby for the respondents.

In the course of the argument Slesser L.J. raised the question whether appeals from the Mayor's and City of London Court could properly be brought to the Court of Appeal, and asked whether the Common Serjeant sitting in the Mayor's and City of London Court was a judge of a county court ?

The case is reported solely on this point.

GREER L.J. delivered a judgment in which he examined the facts and documents and held that the goods were clearly ordered upon the credit of Davidson & Sons, Ld., of Bucksburn, Aberdeenshire, and not by Davidson's Paper Sales, Ld., upon their own credit, as the Common Serjeant had held. The appeal would therefore be allowed.

SLESSER L.J. read the following judgment : I agree that this appeal succeeds for the reasons stated by my Lord. I wish, however, to add some observations on this case which arise on an important question of jurisdiction.

This is an appeal from the Common Serjeant sitting in the Mayor's and City of London Court. The action was for 30*l.* odd, for goods sold and delivered, and judgment was given for that sum. The defendants appealed on the ground that there was no evidence on which the learned judge could properly have come to his conclusion, and that he improperly rejected evidence.

By s. 2 of the Administration of Justice (Appeals) Act, 1934, it is provided that "every appeal from a judgment

. . . . of a judge of a county court . . . . shall lie to the Court of Appeal instead of to the High Court" as was formerly the case.

The Common Serjeant is not a judge of a county court; nor is the Mayor's and City of London Court strictly a county court. By the Mayor's Court of Procedure Act, 1857, s. 43, he presides in the Mayor's Court in the absence of the Recorder, and his appointment is now vested in the Crown, not by the County Courts Acts, but by the Local Government Act, 1888, s. 42, sub-s. 14.

The present Mayor's and City of London Court is constituted by the Mayor's and City of London Court Act, 1920, and is known as the Mayor's and City of London Court (s. 1). The judges, among others, include the Common Serjeant (s. 2, sub-s. 1). By s. 9 it is provided: "For the purposes of all causes and proceedings within the jurisdiction of a county court the Court shall be deemed to be a county court and shall subject to the provisions of this Act be governed by the statutes and rules for the time being applicable to county courts so far as they do not conflict with the London (City) Small Debts Extension Act, 1852."

The present claim for 30*l.* odd is within the jurisdiction of a county court and, therefore, it is necessary to look at the 1852 Act, because, by s. 11 of the 1920 Act, nothing in the Act is to repeal or vary the provisions of the Acts affecting the Mayor's Court or the City of London Court except so far as those Acts are inconsistent with the 1920 Act.

The London (City) Small Debts Extension Act, 1852, regulated the procedure of the Sheriffs Court of the City of London, which was not a county court, and by ss. 78 and 79 an appeal was granted in the form of a case to any of the Superior Courts of Common Law at Westminster.

By the County Courts Act, 1888, s. 185, the Sheriffs Courts held by virtue of the London (City) Small Debts Extension Act, 1852, were thereafter to be held by the name of the City of London Court, and its decisions were to be subject to appeal in the same way and on the same conditions as the decisions of a county court were for the time being; that is, under s. 120, to the High Court. By s. 186 a county court shall mean and include the City of London Court and the judge of that Court.

It follows, therefore, although the Mayor's and City of London Court is not mentioned eo nomine in the 1934 Act, that, in so far as appeals from county courts are now to be heard directly in the Court of Appeal, appeals from the Mayor's and City of London Court within the county court jurisdiction are to be heard in the same way for the time being as coming under s. 186 of the County Courts Act, 1888, and s. 2 of the 1934 Act. Thus, the only limitation in s. 9 of the Mayor's and City of London Court Act, 1920, to the Court being deemed a county court when it is acting within county court jurisdiction—namely, the provisions of the London (City) Small Debts Extension Act, 1852, does not produce any difficulty, because the Act of 1852, as amended in 1888, applies the method of appeal from the county court for the time being to the 1852 Act.

It follows, therefore, that no objection to jurisdiction can be taken in the present case, but nevertheless a most anomalous position has arisen, in that the Mayor's and City of London Court when dealing with a case beyond the limits of county court jurisdiction is not a county court either by interpretation of statute or otherwise. Appeals for more than 100*l*. are still governed by s. 8 of the Mayor's Court of London Procedure Act, 1857: see *Newman* v. *Klausner*. (1)

Under that Act appeals went either to the Court of Exchequer Chamber or to one of the Superior Courts of Common Law, according to the nature of the appeal. The appeal, when not to the Exchequer Chamber, was, under s. 45 of the Judicature Act, 1873, to be determined by Divisional Courts, for by the words of s. 45 appeals from a county court or other inferior court may be heard and determined by Divisional Courts of the High Court: *Appleford* v. *Judkins*. (2)

On the other hand, by s. 4 of the Mayor's Court of London Procedure Act, 1857, in all cases of error arising on proceedings

(1) [1922] 1 K. B. 228.

(2) (1878) 3 C. P. D. 489.

in the Mayor's Court the Exchequer Chamber shall be the Court of Error.

By s. 18 of the 1873 Act, the Court of Appeal has vested in it (sub-s. 4) "all jurisdiction and powers of the Court of Exchequer Chamber," so that in the language of Mellor J. in *Le Blanch* v. *Reuters Telegram Co.* (1) "error has been abolished, and appeal substituted for it." It follows, therefore, that, as the Court of Exchequer Chamber would have had, before recent legislation, exclusive jurisdiction to entertain by way of error the questions arising upon this record, the Court of Appeal is now the proper tribunal to decide them by way of appeal.

By the Mayor's Court Rules, 1892, Order IV., r. 1, demurrer is abolished, and a party may raise by his pleadings a point of law.

By s. 148 of the Common Law Procedure Act, 1852, the writ of error was abolished, and s. 149 lays down how error might thereafter be brought by memorandum alleging error in law in the record and the proceedings. These sections were applied by an Order in Council to the Mayor's Court. Bills of exceptions were no longer necessary, and, as has been pointed out, by the Judicature Act, 1873, appeal was substituted for error; yet some day it may be necessary to consider how far this jurisdiction of the Court of Appeal, deriving through the Exchequer Chamber, is limited to cases where error on the record could have been affirmed by bill of exception and demurrer. As I have said, since 1892 demurrer has been abolished. However this may be, it is quite clear that appeals other than those by error are still to a Divisional Court under s. 45 of the Act of 1873, now s. 24 (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925, when the sum claimed is greater than the county court jurisdiction.

The anomaly which the Legislature may think fit some day to consider, to which I call attention, is this, that, where the proceedings are for 100*l.* or less, the appeal lies to this Court, and also where the amount claimed is greater if the old Court of Exchequer Chamber could have entertained jurisdiction in error; but where the appeal was not entertainable, though larger in amount than 100*l.*, it must be heard by an inferior court, with an appeal to this Court only with leave.

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(1) (1876) 1 Ex. D. 408, 410.

Some of the results of the present confusion were pointed out by the Divisional Court in 1922 in *Newman's* case (1), which decided that an appeal from the Mayor's and City of London Court in an "original Mayor's Court action" must still be brought within two days, and that the High Court has no jurisdiction to extend the time; so that to this extent the greater the claim the lower the status of the appeal tribunal to whom the appeal is to be brought. I think that this state of affairs justifies my description of the matter as an anomalous position.

GREER L.J. With regard to the preliminary point, I did not mention it because I knew that my brother Slesser had gone into it in considerable detail; but I did look at the statutes, and, so far as they affect the question in this case, namely, where in the Mayor's Court less than 100*l.* is claimed, the appeal goes from the judge of the Mayor's Court direct to this Court just as it would if the same matter had been tried in a court which was never anything but a county court. The reference in the 1934 Act to an appeal from a judge of the county court is explained by the fact that some cases are decided by the registrars of the county courts, and it was not intended that those cases should come to the Court of Appeal, but only those cases decided by the learned county court judge. I only intervene to say that I prefer to leave the question as to where an appeal is to go if more than 100*l.* is claimed until that question specifically arises in a case.

SCOTT L.J. I agree with the judgment that has been delivered. I recognize with gratitude the work done by my brother Slesser on the question of jurisdiction, and concur in what Greer L.J. has said as to the limited scope of our actual decision on the point of this case.

I want to add, as regards the subject-matter of the appeal, that in my view there was no evidence at all upon which

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the learned Common Serjeant could find that there was a contract under which credit was given to Davidson's Paper Sales, Ld. In my view, the letters and documents are conclusive that it was given to Davidson & Sons, Ld.

Appeal allowed.

Solicitors for appellants: *Clifford-Turner & Co.*
Solicitors for respondents: *Goulden, Mesquita & Co.*

(1) [1922] 1 K. B. 228.

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CROZIER *v.* WISHART BOOKS, LIMITED, AND OTHERS.

[1935. C. 2000.]

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Jan. 20. 22, 29.

Discovery—Interrogatory—Action for libel against printers and publishers of book—Competency of interrogatory requiring defendants to procure information from author.

A party interrogated is not bound to procure information from persons who are not his servants or agents, or who have not been acting as such.

The plaintiff sued the defendants, the printers and publishers of a book, written by one P., which contained statements which the plaintiff alleged were defamatory of him. To that action P. was not made a defendant. The defendants pleaded fair comment made in good faith and without malice. The plaintiff, who pleaded in reply that the words were written falsely and maliciously, sought to administer an interrogatory to the defendants asking (inter alia), " What information had P. when he wrote the words complained of . . . . which induced you and/or the said P. and which of you to believe that the expressions of opinion or any and which of them in the said words contained and which you allege . . . . are fair comment made in good faith and without malice, were true " :—

Held, that the interrogatory in this form was inadmissible, as the defendants could not be asked as to the information which P., who was not their servant or agent, had on the subject at the time of the publication of the book. The defendants could only be asked what information, if any, they themselves had as to the knowledge of P. when they respectively printed and published the book.

Opinion reserved as to the correctness in law of the dictum of Bankes J. in *Smith* v. *Streatfeild* [1913] 3 K. B. 764, 769, that "in the case of a joint publication of a libel each tortfeasor is liable for the malice of the other."

Decision of Greaves-Lord J. reversed.

APPEAL from an order of Greaves-Lord J. allowing certain interrogatories.

The plaintiff sued the defendants, who were respectively the publishers and printers of a book written by one Francis Plunkett (who was not made a defendant), claiming damages in respect of certain statements therein which he alleged were defamatory of him. By their defence the defendants admitted that the book contained the words complained of, but said that they did not bear and were not capable of bearing any of the meanings alleged by the plaintiff or any defamatory meaning; they further pleaded that in so far as the words consisted of statements of fact they were in their natural and ordinary meaning true in substance and in fact, and in so far as they consisted of expressions of opinion they were fair comment made in good faith and without malice upon facts which were matters of public interest. The plaintiff by his reply joined issue, and said, further or alternatively, that the words complained of were written by Plunkett falsely and maliciously and with the intention that they should be published and printed by the defendants respectively.

The plaintiff sought to administer the following interrogatories to the defendants :—

"(1.) What information had you when in the case of the second defendants you printed and/or caused to be printed and in the case of the first defendants you published and/or caused to be published and what information had Francis Plunkett when he wrote the words complained of by the plaintiff in this action which induced you and/or the said Plunkett and which of you to believe that the expressions of opinion or any and which of them in the said words contained and which you allege in para. 6 of the defence herein are fair comment made in good faith and without malice were true" ?

" (2.) State what steps if any you and/or the said Plunkett and which of you took before in the case of the second defendants printing and/or causing to be printed and in the case of the first defendants publishing and/or causing to be published and in the case of the said Plunkett writing the said opinions to test the said information and ascertain whether the said opinions or any and which of them were founded upon fact."

" (3.) Did you and/or the said Plunkett and which of you believe the said information or some and which part of it to be true ? "

The defendants objected to these interrogatories, but their objection was disallowed by Greaves-Lord J.

The defendants appealed.

Croom-Johnson K.C. and *J. Lhind Pratt* for the appellants. An interrogatory directed to the state of mind of a person who is not a party to the action and is not a servant or agent of the defendants cannot be administered to the defendants: see per Brett L.J. in *Bolckow, Vaughan & Co.* v. *Fisher.* (1)

[They were stopped.]

H. C. Leon (*Sir James Henry* with him) for the respondent. The publication complained of being the joint tort of the appellants and Plunkett, the respondent is entitled to have the interrogatories answered. In *Smith* v. *Streatfeild* (2) Bankes J. said that " the ordinary rule of law is that each tortfeasor is liable for all the consequences of the joint tort. . . . . In my opinion it follows from this rule of law that in the case of a joint publication of a libel each tortfeasor is liable for the malice of the other." That being so, the defendants having chosen to act jointly in the publication complained of, the act is one act of the defendants and Plunkett. In those circumstances comment which is actuated by malice cannot be deemed fair on the part of the person who makes it: *Thomas* v. *Bradbury, Agnew & Co.* (3), and therefore these interrogatories are relevant and admissible to show malice on the part of Plunkett towards the plaintiff: *Pratt* v. *British Medical Association.* (1) The fact that Plunkett has not been made a defendant to the action is for this purpose immaterial. In *Hennessy* v. *Wright* (*No.* 2) (2), Lord Esher M.R. said (3): "Now with regard to comments made by a writer, that privilege (in the sense in which the word is ordinarily used) is destroyed if the writer who makes the comment is actuated by malice, is, in my opinion, beyond the possibility of discussion." In this case, therefore, the malice of Plunkett would defeat the defendants' plea of fair comment. Lord Esher also said in the last cited case that if the answers are material to enable the plaintiff either to maintain his own case or to destroy that of his adversary, the interrogatories ought to be answered. That observation applies in this case. In *White & Co.* v. *Credit Reform Association* (4) Collins M.R. said (5) that "the paramount consideration must be the relevancy of the inquiry to the matter in issue, which is the state of the defendant's mind when he published the statements complained of, and the interrogatories must be held to be legitimate."

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(1) (1882) 10 Q. B. D. 161, 169.

(2) [1913] 3 K. B. 764, 769.

(3) [1906] 2 K. B. 627.

Pratt in reply. The fact that Plunkett is not made a defendant is a vital circumstance which distinguishes this case from those cited on behalf of the respondent. The only persons alleged to have been malicious are the defendants, the printers and publishers, whom it is now sought to interrogate as to the state of mind of Plunkett, who is not a servant or agent of the defendants. The defendants can only be asked to answer for themselves and their servants and agents; they are not bound to procure information for this purpose from other persons: *Bolckow, Vaughan & Co.* v. *Fisher* (6); Gatley's Libel and Slander (2nd ed.), p. 601. The proposition purported to be laid down by Bankes J. in *Smith* v. *Streatfeild* (7) that "each tortfeasor is liable for all the consequences of the joint tort" cannot be accepted as correct. In the present case the appellants are quite ready to state what information, if any, they had from Plunkett at the time they published the book.

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(1) [1919] 1 K. B. 244, 279.
(2) (1888) 24 Q. B. D. 445*n*.
(3) Ibid. 447.
(4) [1905] 1 K. B. 653.
(5) Ibid. 659.
(6) [1882] 10 Q. B. D. 161, 169.
(7) [1913] 3 K. B. 764, 769.

SLESSER L.J. In this difficult case we have been much indebted to counsel on both sides for their arguments. The question is whether certain interrogatories should be allowed in an action brought against the printers and publishers of a book which is alleged to contain defamatory matter. The book was written by one Francis Plunkett, who is not a defendant to the action. It was argued by Mr. Leon on behalf of the plaintiff that the authorities have established that the malice of one joint tortfeasor, the author of the alleged defamatory matter, may be material for defeating what otherwise would be covered by a plea of fair comment, the malice of the author being imputed to the printers and publishers. In my view when these interrogatories are rightly considered it does not become necessary at this stage to express a concluded opinion whether the malice of one joint tortfeasor will upset a plea of fair comment where no malice is shown as against the persons sued. We have been referred to a passage in the judgment of Bankes J. in *Smith* v. *Streatfeild* (1) which appears to indicate that the malice of a writer who is not made a defendant to the action for libel may defeat the privilege claimed by the defendants, the printers and publishers. As I have said, it is not necessary to decide that point or to state to what extent the doctrine there indicated ought to be applied, although no doubt it is a matter of great importance to printers and publishers to know how far the malice of a writer is to be imputed to them. It is said that in *Thomas* v. *Bradbury, Agnew & Co.* (2) there are expressions which support the view expressed by Bankes J. in *Smith* v. *Streatfeild.* (1) On the other hand there are older cases, such as *Robertson* v. *Wylde* (3), which raise difficulties about accepting that view. I think that this appeal should be allowed for a somewhat narrower reason. Assuming that

(1) [1913] 3 K. B. 764, 769.
(2) [1906] 2 K. B. 627.
(3) (1838) 2 Moo. & Rob. 101.

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it is the law that the malice of a joint tortfeasor may defeat the plea of fair comment of the other tortfeasor, these particular interrogatories are framed in such terms as to impose upon the defendants a burden which the law does not require them to sustain. In substance the interrogatories ask the defendants not only what information they had as to the knowledge of the writer at the time of the publication of the book—that I think they are entitled to ask—but they go further and ask what information Plunkett had when he wrote the words complained of and which induced the plea that those words were fair comment and were true. It seems to me that (except in the case of a servant or agent whose knowledge, when acting in the business and on behalf of the principal, may be, as was said by Brett L.J. in *Bolckow, Vaughan & Co.* v. *Fisher* (1), the knowledge of the principal), the person interrogated cannot be asked to make further inquiries as to the information which the author of the book may have had since the date of publication or which he had before or at that date which he never communicated to the printers and publishers. It is interesting to observe that Brett L.J. in the last cited case, after stating that a party is not excused from answering with regard to certain acts by saying that he himself was not present when those acts were done, but his servants or agents were, if the acts were such as in the ordinary course of business would be done by or be known to his servants or agents, added: "I think, however, that he would not be bound to answer as to that which was only known to his servants or agents accidentally and not in the ordinary course of business." The law on this subject is I think correctly stated in Gatley's Libel and Slander, 2nd ed., p. 601, thus: "The party interrogated is not bound to procure information for the purpose of answering from others who are not his agents or servants nor acting as such." For that proposition an Australian case, *McMeckan* v. *Aitken* (2), is cited, but apart from that decision, I think the statement is correctly stated by Mr. Gatley. These interrogatories must therefore be disallowed. Mr. Leon has made

(1) (1882) 10 Q. B. D. 161, 169.

(2) (1891) 17 V. L. R. 301.

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it clear that he is entitled to ask what information the defendants had as to the knowledge of Francis Plunkett when they respectively printed and published the statement complained of. That and no more is he entitled to.

SCOTT L.J. I agree. In my opinion the question whether the passage in the judgment of Bankes J. in *Smith* v. *Streatfeild* (1) is correct is one of great importance in these days when so much matter is published which may be defamatory. The passage reads thus: "In my opinion it follows from this rule of law that in the case of a joint publication of a libel each tortfeasor is liable for the malice of the other." It is not now necessary to decide whether that statement is correct in law, for, assuming that the state of mind of the writer of the alleged defamatory statement is relevant to the liability of the printers and publishers I still think that the interrogatories addressed to them in the form in which they have been framed is oppressive; the inquiry ought to be limited to the information on that topic possessed by the printers and publishers at the relevant moment—namely, the moment of publication.

Appeal allowed. (2)

Solicitors for appellants: *W. H. Court & Son.*

Solicitors for respondent: *Rubinstein, Nash & Co.*

(1) [1913] 3 K. B. 764, 769.

(2) The interrogatories as agreed were as follows: "(1.) What information (including information as to the knowledge of Francis Plunkett when he wrote the words complained of in para. 4 of the statement of claim) had you when in the case of the second defendants you printed and/or caused to be printed and in the case of the first defendants you published and/or caused to be published the said words which induced you and which of you to believe that the expressions of opinion or any and which of them in the said words contained and which you allege in para. 6 of the defence herein are fair comment made in good faith and without malice were true?" "(2.) State what steps, if any, you and which of you took before in the case of the second defendants printing and/or causing to be printed and in the case of the first defendants publishing and/or causing to be published the said opinions to test the said information and ascertain whether the said opinions or any and which of them were founded on fact." "(3.) Did you and which of you believe the said information or some and which part of it to be true?"

J. S. H.

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Dec. 4.

SILCOCK AND SONS *v.* GREEN.

[1935. S. No. 1310.]

Metropolis—Street Widening—Compulsory purchase—Power of Council to take part of partially completed building—Metropolitan Paving Act, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

A local authority purporting to act under the powers conferred by the Metropolitan Paving Act, 1817, served on the defendant a written notice to treat for the compulsory purchase of part of a piece of land on which a house then uncompleted was in course of erection:—

Held, that the principle that a notice to treat for the compulsory purchase of part of a building is bad if the purchase of the part will cause a substantial interference with or alteration in the character of the whole building, applies where the building, part of which it is proposed to purchase compulsorily, is not complete at the time the notice is given, being in course of construction.

Held, also, that the notice is bad if it refers to "land" only, being the site of the building part of which it is proposed to purchase compulsorily.

ACTION tried by Charles J.

The plaintiffs, Silcock & Sons, builders, claimed damages from the defendant for breach of contract. In September, 1934, the plaintiffs and defendant entered into a written contract whereby the plaintiffs were to demolish a house standing on land belonging to the defendant in Commercial Road, Stepney, and to erect another in its place. The plaintiffs had demolished the existing house and had begun to erect the new house when on November 1, 1934, the Stepney Borough Council, purporting to act under the powers conferred by the Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.) (Michael Angelo Taylor's Act), ss. 80, 82, served on the defendant a written notice to treat for the compulsory purchase by them of part of the land occupied by the abovementioned partially erected house. The defendant, treating this as a good notice, wrote to the plaintiffs informing them of it and instructing them to discontinue the building operations on the ground that in consequence of the notice the object contemplated in building the house had been frustrated, and that it had become impossible for the contract to be carried out.

The material part of the notice, given in pursuance of a road-widening scheme, was as follows: "The lands in the said street or public place shown by red colour on the plan in duplicate produced to the borough council and signed in duplicate by the mayor (hereinafter referred to as 'the signed plan') project into, obstruct or prevent the borough council from so altering, widening and extending the said street or public place, and the possession, occupation and purchase of the said lands coloured red on the signed plan will be necessary for that purpose."

Part only of the defendant's land was coloured red on the signed plan.

The plaintiffs then brought this action, alleging that the notice was bad in law as referring to part of the property proposed to be taken and not to the whole, and also because it referred only to "lands" and not to the building, part of which it was proposed to purchase compulsorily, and contending that the defendant should have ignored it and carried out her contract.

A. M. Sullivan K.C. and *Harold B. Williams* for the plaintiffs.

J. W. Morris K.C. and *Arthur H. Forbes* for the defendant.

Charles J. Although on the face of it this is a simple case, an interesting point arises for decision, apparently for the first time.

On the receipt by the defendant of the notice to treat she accepted it as a good notice, and on her instructions there was a definite stop put to the contract with the plaintiffs for the erection of the building.

With regard to the question of law, it is argued for the defendant that the notice to treat was good and one of which she was bound in law to take notice, that she did not in truth break the contract but that it was entirely frustrated by the

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notice. There is a considerable line of cases in which the view is expressed that if anything unforeseen by the parties happens which causes the subject-matter of the contract to disappear and the contract to become impossible to carry out, then, the whole basis being gone, the parties cannot be bound, since there is no material on which to uphold the contract as it existed at the time of the frustrative act. The whole value of that submission in this case depends on the view taken of the notice to treat. If it was a good notice, it may be—although I have been in some doubt about it—that it was a happening sufficiently unforeseen to frustrate the contract. Of course, if the parties could reasonably have foreseen the possibility of a notice to treat, the doctrine of frustration could not apply. The policy of the law is against frustration and in support of contracts. If a contract solemnly entered into between two parties can be supported, it ought to be. I have in mind how Bailhache J. fought against frustration in the requisition cases which arose in consequence of the War.

I am quite satisfied that this notice was bad. I will refer to the cases presently, but, to speak generally, they show that if the intended purchase is such as would cause a substantial interference with or alteration in the character of a building, then a notice to treat which refers to part only of the building is bad. It must refer to the whole of the building. The person on whom a notice referring only to a part is served has the right, which has often been exercised, to insist that the server of the notice, having the right in law to take the whole building, shall do so. He may refuse to allow a partial removal of the building which completely alters its character and its amenities, and destroys its shape, its value and perhaps the purpose for which it was put up, and he may refuse to accept the notice and require that the whole or nothing may be taken.

In this case there are circumstances which I do not find in any other case, because the building in question is a partly erected one. Looking at the matter from the point of view of the building intended to be erected, it is quite clear that the interference proposed was a material and substantial one. It very greatly affected the type of building being put up. I need only refer to one particular. The depth of the building was 96 feet, and the intention was that a showroom should run from the street front to the very back of the building. It was to be not one showroom but a chain of showrooms. The lopping off from the front of the piece required for road widening would leave a truncated structure which, having been robbed of its front part, could not fulfil the purpose for which the original building was designed, though it might fulfil some other purpose.

My attention has been directed to certain cases material to the consideration of this point, and in particular to *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1), which came before a Divisional Court. Cave J. there said (1): "The question whether under the statute there is power to take a portion of a house has never been authoritatively settled. There have been several decisions in cases with respect to taking a portion of land; and, questions having arisen in those cases with respect to the compulsory powers given by the Act, opinions have been expressed which, even supposing they are to be treated as dicta merely, are entitled to our respectful consideration. It has been settled that a portion of an estate may be taken; but that, of course, does not decide the question we have here to deal with, because the words used in the section [s. 82 of the Act of 1817] are 'houses, buildings, lands, tenements, or hereditaments,' and if you take a portion of an estate you do take land. It cannot, in strictness perhaps, be said that you take a portion of land. Land is a thing which admits of division in point of fact; and, when you take so much of it as is necessary for the purpose of the improvement, you take land, it seems to me, within the meaning of the Act. By the express decision of the Court of Appeal in *Gard* v. *Commissioners of Sewers of the City of London* (2) you are entitled to take a portion of a piece of land. Though the piece be the only one which the man from whom you are seeking to take it has, and though it be in one occupation and ownership, nevertheless it has been held that you may take a part of that piece, and that the language of the Act gives the power and the right to take a part where land only is concerned. When, however, a house has to be dealt with, different considerations arise. You may divide a piece of land and make of it two pieces of land, and each is land for all purposes; but you cannot divide a house and make of it two houses; you get something which is not a house. If you take half of a building occupied as a tavern, you do not take a tavern and leave a tavern; you take part of a whole thing, and leave the other part of that whole thing for the previous owner of the whole. So far as I can see, the Act does not contemplate that that shall be done; it does not contemplate that part of a house may be taken in the sense that the owner shall be left with something which is not a house, which cannot be used for the purpose for which the house was used before, and which is essentially different in its character and condition from what the house was before. If that were the case made out here, I should be clearly of opinion that the Act of Parliament did not enable a portion of the house in that sense to be taken, and that the whole house must be taken by the vestry." Later Cave J. said (1): "I am of opinion, however, that it is not enough to say, as was urged in the argument addressed to us on behalf of the plaintiffs, that any interference with a house, which will have the effect of requiring alterations to be made, and of diminishing the value of the premises to some, however small, extent, is of itself alone sufficient to cast upon the vestry the necessity of taking the whole house or foregoing the improvement which they think is necessary. But, on the other hand, if what the vestry propose to do will have the effect of so altering the character and condition of the house that it can no longer be occupied as the kind of structure it was before, then I am of opinion that the vestry are proposing to do something which the law does not enable them to compel the owner of the house to accede to." As I have said, I find that the contemplated interference with

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(1) [1894] 2 Q. B. 742, 748.

(2) (1885) 28 Ch. D. 486.

(1) [1894] 2 Q. B. 750.

this house is in effect an alteration in its character and condition so that it can no longer be regarded as the kind of structure which it was before.

Gordon v. *Vestry of St. Mary Abbotts, Kensington* (1), was considered and approved in *Gibbon* v. *Paddington Vestry.* (2) In that case Stirling J. dealt very carefully with the authorities which govern this matter. In the course of his judgment he said (3): "It will be observed that in the first portion of the section which I have read the Act speaks of houses, walls, buildings, and so forth, 'or any part thereof'; but in the later part of s. 80, and also in s. 82, which confers the compulsory powers, the words 'or any part thereof' do not appear."

Later in his judgment (4) Stirling J. quoted from the judgment of Collins J. in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington,* the following passage (5): "It is not enough to oust the jurisdiction of the vestry to say simply that the structure sought to be removed cannot be taken and removed without altering the appearance of the premises and involving alterations thereto, and that the taking of the land will diminish the value of the Town Hall Tavern to the plaintiffs. Those facts are not, in my opinion, sufficient to destroy the right of the vestry to give the notice. There must however, I think, be the distinction in point of fact which has already been pointed out between land and a house. Land is by its nature capable of being divided; a house is prima facie a unit incapable of division; but there are cases in which it would be impossible to say that a portion of a house might not be cut off without destroying the identity of the house itself. If a particular part of a house can be pointed to which the vestry, bona fide, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say that there is nothing to prevent the vestry from compulsorily taking that part only.

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(1) [1894] 2 Q. B. 742.
(2) [1900] 2 Ch. 794.
(3) Ibid. 798.
(4) Ibid. 801.
(5) [1894] 2 Q. B. 754.

If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed, is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a house, then I think the vestry are not entitled to say that 'part thereof' only obstructs, or that 'part thereof' only is necessary to be removed for the purpose of the improvement. Under those circumstances I am of opinion that the vestry could not stop short of taking the whole."

Stirling J. then continued (1): "Now, as I have said, I think it is my duty to give effect to that exposition of the law; and the result of it seems to be this—that in the construction of this Act a limitation is to be placed on the word 'part.' If a local authority desire to take part of a house, the portion taken must be something which can fairly be called a 'part.' If, for example, there is a porch or a conservatory, or a cellar, which can be removed without substantially destroying the house as a house, that, according to the decision, may be taken; but if, on the other hand, a substantial portion is taken by the authority, so that the use of the house is substantially injured and can no longer be enjoyed as it was before, then it seems to me that it is laid down that the whole must be taken. In the present case the front wall and four feet were to be taken. Even if the owner rebuilds the front wall, the shops will be substantially reduced in size. It is said that the back parlour may be thrown into the shop, and the room beyond that used as the back parlour, and so on; but still, even if that were to be done, in my opinion, the house would no longer be so convenient, nor could it be substantially used for the same purposes, as it was before. In my judgment, according to the law which is laid down by the Divisional Court, the plaintiff is entitled to say that the vestry shall take the whole of these houses."

Gibbon v. *Paddington Vestry* (2) was considered and approved

(1) [1900] 2 Ch. 802.

(2) Ibid. 794.

in *Beyfus* v. *Westminster Corporation* (1), which was a case under the same Act of Parliament, the Metropolitan Paving Act, 1817. Sargant J. there said (1): "Counsel for the defendants was all through his argument on behalf of the defendants asking me to consider whether what was left was substantially a house. I think that is a fallacy. I think what has to be regarded is not what is left, but what is taken, and if such a substantial part is taken such a substantial injury is inflicted on the house as is represented by a diminution of rent from 130*l.* to 110*l.* a year. I think that is conclusive evidence of a substantial injury within the meaning of the decision of Stirling J. I observe this also—that in deciding as I am deciding I am following the universal practice in these matters, because counsel for the defendants admitted in his argument that as a matter of practice local authorities have never yet succeeded in their contention that they were to take part only of a house where the owner desired the whole to be taken, unless the part proposed to be taken were of the nature of an excrescence, such as a porch or something of that kind; and therefore I should be going not only contrary to the decision of Stirling J., but contrary to the universal practice in these matters, if I decided, when so large a portion of a house is taken as is proposed to be taken in the present case, that that did not entitle the owner of the house to insist upon having the whole taken."

The judgment in *Gibbon* v. *Paddington Vestry* (2), agreeing with those of the Divisional Court in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (3), is one which I consider myself bound to follow. All that is new here is that the law as expressed to be applicable to a completed house is being applied for the first time to a house partially erected. I come to the conclusion, therefore, that there being contemplated a substantial interference with the building partially erected under the contract between the plaintiffs and the defendant, the notice to treat in respect of part of it is bad. On receiving it the defendant could have thrown it into the waste-paper basket; she could have written and said that she was not going to give up a part of this house since she wanted it as a whole, and that the council must, if they wanted anything, take the whole of the premises. The answer, as we now know, would have been a refusal to take the whole and an insistence that the law permitted the taking of a part. The defendant ought to have allowed the building to go on.

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(1) (1914) 84 L. J. (Ch.) 838, 841.

(2) [1900] 2 Ch. 794.

(3) [1894] 2 Q. B. 742.

It is curious that the notice to treat refers only to lands. I have come to the conclusion that for that reason also, although it is not the basic one, the notice was bad.

Having come to that conclusion, I am clearly of opinion that there was no sort of frustration of the contract. The defendant was in law bound to implement the contract into which she had entered. She refused to do so because she or her advisers had come to the conclusion that some step had been taken in law which of necessity and by force of law made her put an end to the contract. If my conclusions are right she was under no such compulsion, and her contractual obligation to the plaintiffs remains untouched.

They are therefore entitled to damages for the wrongful termination of the contract, and there must be judgment in their favour.

Judgment for plaintiffs.

Solicitors for plaintiffs: *A. M. Longhurst & Butler.*
Solicitors for defendant: *Forbes & Son.*

W. L. L. B.

THE KING *v.* INCOME TAX SPECIAL COMMISSIONERS.

Ex parte ELMHIRST.

C. A.
1935
Oct. 17;
Dec. 2, 3.

Revenue—Income tax—Appeal to Special Commissioners against assessment—Withdrawal of appeal—Refusal by Commissioners to allow withdrawal—Duty of Commissioners—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Part VII.*

Notice of appeal to the Special Commissioners of Income Tax was given by a taxpayer who subsequently gave notice that he withdrew the appeal:—

Held, by the Divisional Court and the Court of Appeal, that the appeal could not be withdrawn without the consent of the Special Commissioners, since, when the notice of appeal was given, it became their duty to arrive at the true assessment, an appeal against an assessment under the Income Tax Act, 1918, being on a different basis from an appeal in private litigation.

RULE NISI for prohibition.

In June, 1932, an additional assessment to income tax was made on the applicant, Leonard Knight Elmhirst, by the Commissioners of Income Tax for the parish of Dartington, Devon, for the financial year 1925–6, in the total sum of 5200*l.* under Sch. D of the Income Tax Act, 1918. On July 5, 1932, notice of appeal to the Special Commissioners of Income Tax against the assessment was given on behalf of the applicant. Certain investigations into the matter were made and on November 21, 1933, the applicant gave notice that he withdrew the appeal. The Special Commissioners, however, refused to allow the appeal to be withdrawn, insisting that it should be heard and determined by them.

The applicant, therefore, obtained a rule nisi calling on the Special Commissioners to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding to hear the appeal on the ground that, the appeal having been withdrawn, there were no appeal proceedings in existence and no jurisdiction in them to hear any such alleged appeal.

Sir Thomas Inskip A.-G. and *R. P. Hills* showed cause.

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J. Millard Tucker K.C. and *J. S. Scrimgeour* in support.

LORD HEWART C.J. In my opinion the argument of the Attorney-General is right and that advanced in support of the rule is manifestly based on the misapprehension that an appeal against an assessment under the Income Tax Act, 1918, is the same in substance as an appeal by one of two private persons against a decision in favour of the other in litigation between them. The two things are totally different. As was said by Greer L.J. in *Inland Revenue Commissioners* v. *Sneath* (1): " the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question." In the same case, Romer L.J. said (2): " The proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment. . . . The appeal is merely another step taken by the [Special] Commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax."

When the applicant in the present case gave notice of appeal against his assessment he opened a door into a room which contained a great deal more than his notice of appeal. The scheme of the Income Tax Act, 1918, appears to me to be perfectly plain. Sect. 136 provides that a person aggrieved by an assessment shall be entitled to appeal to the Commissioners on giving notice of his intention to do so. It is true that by s. 137, sub-s. 4, in a proper case the Commissioners are to abate or reduce the assessment, but that is by no means the whole of the matter. By the corresponding provision of s. 137, sub-s. 5, if the appellant ought to be charged a sum in excess of that which he is charged, the Commissioners must charge him with the excess. That is a duty owed by the Commissioners to the hidden parties to

(1) [1932] 2 K. B. 362, 385.

(2) Ibid. 390.

the appeal—namely, the general body of the taxpayers. By s. 139, sub-s. 1, the mere receipt of the notice of appeal gives the Commissioners large powers as against the appellant.

Our attention has been directed to *Gundry* v. *Dunham* (1), which was described as the authority most in favour of the applicant, but that case seems to throw no light on the point now before the Court. It appears to decide what a determination may be, not what an appeal is.

In my view, it is quite plain on the wording of these sections that the fact that an appeal had been started makes it obligatory on the Commissioners to take steps, not merely or even primarily in the interest of the person appealing, but in pursuance of the duty imposed on them in the interest of the general body of the taxpayers, to ascertain what the true assessment ought to have been. That process, directed to public needs, cannot be stopped by the whim of an appellant who, perhaps, begins to realize that, if he pursues his appeal, it may be the worse for him. The matter has passed out of his hands after he has given notice of appeal. By that notice he gives the Commissioners not only the opportunity, but also the duty, of performing a public task which may have a result of a character entirely opposite to that which he anticipated when he gave the notice to appeal.

HUMPHREYS J. I agree.

SINGLETON J. I agree.

Rule discharged.

G. F. L. B.

Mr. Elmhirst appealed. The appeal was heard on December 2 and 3, 1935.

J. Millard Tucker K.C. and *J. S. Scrimgeour* for the appellant.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown.

The arguments and the relevant sections of the Income Tax Act, 1918, are fully set out in the judgment of the Master of the Rolls.

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Lord Wright M.R. This is an appeal from a judgment of the Divisional Court discharging a rule nisi which had been granted to the present appellants addressed to the Commissioners for the Special Purposes of the Income Tax Acts and requiring them to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding to hear an appeal against an additional assessment to income tax No. 55371 made by the Commissioners of Income Tax for the parish of Dartington under Sch. D for the year ended April 5, 1926, in the total sum of 5200*l.*

The facts of the case need not be referred to except in the baldest outline, because the matter at issue turns on the true construction in the circumstances of the case of certain sections of the Income Tax Act, 1918. The notice of the assessment, which was an additional assessment, was dated June 14, 1932, and the assessment was in respect of the tax year 1925–26. The appellant, Mr. Elmhirst, had in 1925 married an American lady of considerable wealth, He had acquired definitely and beyond question a residence in this country in 1926 after the determination of the previous tax year up till April, 1926, and it appeared to the Commissioners that in fact he had resided for tax purposes in this country in the years 1925 and 1926, and thereupon this additional assessment was made. He gave notice of appeal from that assessment on July 5, 1932, and matters proceeded on the basis of a pending appeal until November 21, 1933, when he wrote a letter to the inspector withdrawing or purporting to withdraw his notice of appeal; in view of that he has contended that the Commissioners have no further jurisdiction to proceed in the matter; his main argument is that a notice of appeal so given may admittedly give to the Commissioners certain powers—for instance, the power to issue a precept ordering delivery of a schedule of particulars under s. 139—but that there is no appeal being prosecuted by him. He distinguishes a notice of appeal from an actual appeal, his argument being that the actual appeal is only constituted and the powers of the Commissioners to hear the appeal and to determine the appeal as contrasted with preliminary powers only come into effect when he actually appears at the hearing, the date having been fixed for the hearing, as in fact it was in this case; if he does not do that—if he does not appear and indeed gives notice that he does not intend to appear and has withdrawn his notice—then it is contended the whole of the jurisdiction of the Commissioners ceases entirely and they cannot go on any further and deal with the assessment.

The point at issue is this: that on an appeal the Commissioners have not merely a right of reducing the assessment which has been made in favour of the appellant, but if the appeal proceeds they have the power to alter it against the interests of the appellant and to increase the assessment. In this particular case it is said (we have not gone into the facts and have not considered them) that the assessment ought to be something like ten times as much as the sum so far assessed upon the appellant. In order to determine the issue of law so raised it is necessary to refer to certain sections of the Income Tax Act, 1918, some of them from Part VI. but the majority from Part VII., which is the Part dealing with appeals.

It must be admitted at the outset that these sections do present some difficulties, or at least apparent difficulties, because of their phraseology and arrangement, but I have come to the conclusion, after considering all these sections, that the decision of the Divisional Court was right and should be affirmed and that the appeal should be dismissed.

I will refer shortly in the first place to s. 121 in Part VI., the Part dealing with assessments and not with appeals. That section concerns the procedure to be followed in order to make an assessment when there is no question of an appeal. Sects. 121 and 122 are to be read together, and the end of s. 122, sub-s. 3, is significant. I am only dealing here with assessments under Sch. D. The sub-section says: "The assessments under Schedule D, certified and delivered by the additional commissioners to the general commissioners, shall be allowed and confirmed by the general commissioners after the time for hearing appeals against such assessments

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has expired." Although the assessment is made provisionally by the Additional Commissioners it is not effective until it has been allowed and confirmed by the General Commissioners, and the final words which I have just read mean that, if no notice of appeal has been lodged and the time for hearing appeals has expired, then the assessment is to be allowed and confirmed. I need not deal in detail with the provisions of s. 121. In the first place, the surveyor has to examine the statements by the taxpayer which have to be laid before the Additional Commissioners. The section provides that, when a surveyor has had a reasonable time for the examination, the Additional Commissioners shall appoint meetings for the consideration of such statements as are then, or from time to time, delivered to them. If the Commissioners are satisfied that a statement is in accordance with the Act and is sufficient, or that there is no ground to doubt the sufficiency of the statement, and the surveyor makes no objection, the Additional Commissioners are to direct the assessment to be made in accordance with the statement. If, however, the surveyor declares himself dissatisfied with the determination of the Additional Commissioners, he can then require them to state and sign a Case for the opinion of the General Commissioners, and (s. 1, sub-s. 3, proviso ii). : "The General Commissioners shall, with all convenient speed, return the Case with their opinion subscribed thereon, and the assessment shall be altered or confirmed accordingly." Then there is a provision for what is to happen if the taxpayer makes a default in delivery of a statement, or the Additional Commissioners are not satisfied with the statement delivered, or if the surveyor makes an objection in writing to the statement setting forth the cause thereof. In any of these cases the Additional Commissioners are to make an assessment on the person concerned in such sum as, according to the best of their judgment, ought to be charged on him. Then there are further provisions, and in particular a provision that if the surveyor, after examining the assessment which the Additional Commissioners have made, before it is delivered to the General Commissioners, makes an objection in writing as to the amount of the assessment, the Additional Commissioners shall certify his objection, and any information they have obtained respecting it, to the General Commissioners, and (sub-s. 8): "The surveyor shall give notice of his objection and particulars thereof to the person assessed, in order that he may appear before the General Commissioners in support of the assessment."

This is all I need say on the general procedure where there is no question of an appeal, and I may note here at once, that in making the assessment and in dealing with the appeals, the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case inter partes; they are assessing or estimating the amount on which, in the interests of the country at large, the taxpayer ought to be taxed.

I may at this point refer to a very short passage in *Inland Revenue Commissioners* v. *Sneath.* (1) The question in that case was whether the decision of the Commissioners in one year constituted an estoppel binding the Commissioners in the following year: It was held that it did not. The reasons on which that decision was based involved some discussion of the province and duty of the Income Tax Commissioners. That case was concerned with surtax, but the general principles apply to any form of income tax. Romer L.J. said this (2): "The duty of the Commissioners, as I read the provisions of the Income Tax Acts, is to form an estimate in each year of assessment of the amount of the income of the taxpayer on which the surtax imposed for that year is to be charged. For this purpose the taxpayer is required to make a return of his income from all sources as defined by s. 5 of the

(1) [1932] 2 K. B. 362. (2) Ibid. 390.

Income Tax Act, 1918. With this to guide them, the Special Commissioners have then to form their own estimate of the total income and to make an assessment accordingly. If the taxpayer is not content with such assessment he can bring the matter before the Special Commissioners by way of appeal. But the proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment, and the Special Commissioners may, if they think fit, increase the assessment made by them in the first instance. The appeal is merely another step taken by the Commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax." With these words in mind, I can now turn to Part VII. of the Act, which deals with appeals. Sect. 133, sub-s. 1 (*a*), is in these terms: "Save where expressly authorised by this Act, the General Commissioners shall not alter any assessment before the time for hearing and determining appeals, and then only in cases of assessments appealed against, and in accordance with their determination." Sub-s. 3 provides: "Where an objection has been made by the surveyor to an assessment upon any person, and that objection has been dealt with and determined on appeal, the surveyor shall not, thereafter, make any further charge for the same year, upon that person, in respect of the same matter, property, or profits included in the assessment to which the objection, so determined, was made." That relates back to the provisions of ss. 121 and 122.

Sect. 134 deals merely with notices of the assessments and time for hearing appeals, and s. 135 provides for notice of meetings to hear appeals: "Notice of appeal meetings to be held by the General Commissioners shall also be given to the surveyor by the clerk to the Commissioners." By s. 136, sub-s. 1: "A person aggrieved by any assessment upon him, made by the Additional Commissioners, or by the assessor for any parish, or by a surveyor, in any first or additional first assessment, or by any objection by the surveyor to an assessment made by the Additional Commissioners, shall be entitled to appeal to the General Commissioners, on giving notice in writing to the surveyor, within twenty-one days after the date of the notice of such assessment or objection." That section in my opinion does not have the meaning which Mr. Tucker has sought to attach to it. He relies on the words "shall be entitled to appeal . . . . on giving notice," and says that the right given by sub-s. 1 is not a general right of appeal, but merely a right to give notice of appeal, and that a person is nowise committed to the position of an appellant because he has given a notice of appeal. I do not accept that construction of s. 136, sub-s. 1. I think it gives to the taxpayer, if he is aggrieved by the assessment, a right of appeal in general terms. "Entitled to appeal" means that he has that right conditioned on his giving notice within the proper time, but, in my opinion, if he does give that notice, then an appeal is constituted with whatever consequences may follow from that circumstance. Sub-s. 3 of s. 136 was also referred to as indicating, in the submission of Mr. Tucker, that the presence of the taxpayer at the hearing of the appeal was something essential to the continuance of the appeal. But I do not so read the sub-section. I think all it means is that the person aggrieved shall have the opportunity of being present, and that there shall be no decision behind his back without his having had a proper opportunity of coming, if he wanted to come.

Sect. 137 deals with the duty of the Commissioners to give notice of the days for hearing appeals to every appellant, and the word "appellant" there is important. To my mind, it indicates that, when the provisions of s. 136 have been followed, the taxpayer who has given notice of appeal is an appellant, and that there are appeals in existence which have to be heard. There are three other sub-sections of s. 137 which I think ought to be noticed. Sub-s. 2 says: "The surveyor and the assessor may attend every appeal, and shall be entitled—(*a*) to be present during all the time of the hearing, and at the determination of the appeal; and (*b*) to produce any lawful evidence in support of the assessment or surcharge; and (*c*) to give reasons in support of the assessment or surcharge." There is nothing there which is negative ; the surveyor and assessor are given certain positive rights, and in particular the right to be present during all the time of the hearing ; and, having the right and also the duty to be present, they are available to give such information and help to the Commissioners on the hearing of the appeal as may appear to the Commissioners to be necessary or desirable. Then by sub-s. 4 : "If, on an appeal, it appears to the majority of the Commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment or surcharge, the Commissioners shall abate or reduce the assessment or surcharge accordingly, but otherwise every such assessment or surcharge shall stand good." Then sub-s. 5, which is complementary, because sub-s. 4 is not, as it might appear to be at first sight, comprehensive, says : "If, on any appeal, it appears to the Commissioners that the person assessed or surcharged ought to be charged in an amount exceeding the amount contained in the assessment or surcharge, they shall charge him with the excess." These two sub-sections clearly contemplate, first, that an appeal has been constituted by the giving of the notice of appeal, and, secondly, that on the hearing of that appeal the appellant may give evidence on oath, other lawful evidence may be called, and, furthermore, that the Commissioners have the duty and the right of coming to a conclusion, not only diminishing but, if that appears to them the proper course, increasing the assessment.

Sect. 139 has been much debated, and I think that section has to be read as part of a general code which goes at least to the end of s. 145. I think all these sections must be read together to give a picture of what is to happen when the process starts which is indicated in s. 139. It will be noted in s. 139 that the start of the whole process, and the foundation of the jurisdiction and the duty of the General Commissioners, depend on their having received notice of appeal. I ought to have said that we are dealing with Special Commissioners and not the General Commissioners, because the choice of appealing to the Special Commissioners has been exercised in this case, and I shall call them in future "the Commissioners," because I need not distinguish between the General and the Special Commissioners, and what I am going to say will apply equally to either class of Commissioners. Sect. 139, sub-s. 1, provides: "If the General Commissioners have received notice of appeal against an assessment made by the Additional Commissioners, or see cause to allow the objection of the surveyor to any such assessment, they shall issue a precept to the appellant ordering him to deliver to them, within the time limited by the precept, a schedule containing such particulars, for their information, as they may demand under the authority of this Act." The schedule is to contain particulars of the profits or gains and so forth of the taxpayer with the deductions made in arriving at his profits or gains, "which particulars the said General Commissioners are hereby empowered and required to demand at their discretion whenever the same shall appear to them necessary for the purposes mentioned in this Act." Then, by sub-s. 2, further precepts may be issued by the Commissioners when they consider it necessary, until complete particulars have been furnished to their satisfaction. By sub-s. 3 the person to whom a precept is issued is bound to deliver the schedule required within the time limited, and in default to forfeit a sum not exceeding twenty pounds and treble the tax at which he ought to be charged. By sub-s. 4 the surveyor is entitled at all reasonable times to inspect and take copies of the schedule. Mr. Tucker does not contest the proposition that, once notice of appeal has been given by his client, his client is under an obligation to obey the precept and to deliver a schedule containing the necessary particulars and such further schedules as may be required. Sect. 140 deals merely with penalties for failure to deliver a sufficient schedule, and also gives the taxpayer a right to rectify or amend the schedule in proper cases. Then the precept, it is assumed, has been duly obeyed and a schedule has been issued, and thereupon the position of the surveyor is taken into account. Sect. 141, sub-s. 1, says:

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" The surveyor may, within a reasonable time to be allowed by the Commissioners to whom an appeal is made "—again emphasising the fact that there is a subsisting appeal at that stage—" after examination by him of any schedule, object to such schedule or any part thereof, and in that case shall state, in writing, the cause of his objection, according to the best of his knowledge or information." By sub-s. 2 the person to be charged is to have notice in writing of that objection and he may appeal against the same. By sub-s. 3: " No assessment shall be confirmed or altered until any appeal against such objection has been heard and determined." Here the surveyor is put in the position of initiating a step on his own account. The schedule has been delivered, the surveyor objects, and thereupon the taxpayer is entitled to appeal, if he thinks fit, against that objection. That is a matter which seems to be, as it were, a subsidiary appeal; but the proceeding which follows inevitably from the delivery of the precept may decide the whole matter of the assessment.

Sect. 142, however, proceeds to deal with the matter in still further detail. It deals with two contingencies. " If—(*a*) the Commissioners to whom an appeal is made see cause to disallow an objection of the surveyor to a schedule; or (*b*) on the hearing of an appeal, the Commissioners are satisfied with the assessment made by the Additional Commissioners, or if, after the delivery of a schedule, they are satisfied therewith, and have received no information as to its insufficiency, they shall direct the assessment to be confirmed or to be altered in accordance with any such schedule, as the case may require." That deals with the circumstance of the Commissioners being satisfied with the schedule, and the assessment will in that case be confirmed or altered in accordance with the schedule.

Then comes a series of provisions which deal with the case of the Commissioners being dissatisfied with an assessment delivered to them by the Additional Commissioners, or with a schedule, or if they require further information relating thereto. In any such case they may, by s. 143, sub-s. 1, " at any time and from time to time, by precept, put any questions in writing concerning the assessment or schedule, or any matter which is contained or ought to be contained therein, or concerning any deductions made in arriving at the profits or gains, and the particulars thereof, and may require true and particular answers in writing, signed by the person to be charged, to be given within seven days after the service of the precept." By sub-s. 2 (*a*): "The person to be charged shall, within the time limited, either answer any such questions in writing signed by him, or shall tender himself to be examined orally before the Commissioners, and may object to, and refuse to answer, any question, but the substance of any answer or answers given by him orally shall be taken down in writing in his presence, and be read over to him, and after he has had liberty to amend any such answer or answers he may be required to verify the same on oath to be administered to him by any one of the Commissioners." The next part of the clause is mere machinery enabling the taxpayer, instead of himself being examined, to tender someone on his behalf to attend and be examined. That obviously provides for an oral proceeding or hearing in the course of the appeal which has, as we have seen, been proceeding since the time when the notice of appeal was given. Sect. 144 gives the Commissioners further powers of acquiring information to enable them to perform their duties. It enables them to "summon any person whom they think able to give evidence respecting an assessment made or to be made on another person, to appear before them to be examined, and may examine such person on oath (except the clerk, agent, servant or other person confidentially employed in the affairs of a person to be charged . . . .)," and so forth, and by sub-s. 3 there is a penalty attached to any failure by such witness to answer truly in accordance with the oath. Sect. 145 deals in the main with the case where there has been neglect or refusal by a person required to deliver a schedule in accordance with a precept, or where a clerk, agent or servant or any such person, having been summoned, has neglected or refused to appear before the Commissioners to be examined or has declined to answer questions. Two further and rather different categories are then dealt with in the section. The first is where an objection has been made to a schedule and the objection has not been appealed against, and the second is where the Commissioners decide to allow any objection made by the surveyor. The section then provides that in all or any of these circumstances " the Commissioners shall ascertain and settle, according to the best of their judgment, the sum in which the person chargeable ought to be charged, and shall make an assessment and charge accordingly."

I do not think it necessary to discuss any of the further sections in this Part of the Act relating to appeals. I will only say that on an examination of this code (because I think all these sections from 139 to 145 inclusive ought to be read together as embodying an inclusive code), the conclusion I draw is that the Commissioners, having set before them the duty of ascertaining and settling according to the best of their judgment the sum on which the taxpayer ought to be assessed, are required to make the assessment in accordance with that judgment.

In view of that consideration, I find it quite impossible to accept the argument that the giving of the notice of appeal is merely a sort of offer or an act from which the taxpayer can at his discretion at any time resile, subject to his obeying the precepts and so forth, and that he can at any moment prevent the Commissioners from ascertaining and settling the sum to be assessed by the simple process of intimating by word or by deed that he withdraws the notice of appeal, and that in such circumstances there is no appeal pending at all. It seems to me that the code contained in these sections is quite inconsistent with any such argument. It would indeed be a curious position if, notice of appeal having been given by the taxpayer in the hope of reducing his assessment, he should be able, when the information elicited shows quite conclusively that the assessment, so far from being an overcharge, was an undercharge, to prevent the Commissioners from estimating or valuing or assessing his liability according to the true facts which have been elicited, or that they should be debarred from proceeding further to develop the facts so as to ascertain the true position. The whole trend of these sections seems to be quite inconsistent with, and quite contrary to, any such view.

There is one phrase which I think was relied on, and which is used in more than one instance: "on an appeal," or "upon the hearing of an appeal." It was argued that there could not be a hearing of an appeal unless the appellant were present. I find it quite impossible to accept any such view. Even if the appellant does not think fit to be present the machinery of these sections shows that in such a case the Commissioners have the power and the duty of examining all the facts, and that such power is given to them by the mere giving of the notice of appeal. Having a duty to examine the facts, they are bound to give effect to what appears to them to be the proper assessment to be made in view of those facts.

For these reasons I think that the appeal should be dismissed, with costs.

Romer L.J. I agree, and have only a few words to add. The Income Tax Act, 1918, provides the procedure to be adopted for the purpose of assessing the gains or profits of an income tax payer under Sch. D. That procedure is as follows: After the statement of profits or gains has been made by the income tax payer in accordance with the Act, that statement is laid by the surveyor before the Additional Commissioners, unless an assessment has to be made by the Special Commissioners. In general it is laid before the Additional Commissioners. If they are satisfied that the statement has been made bona fide so as to enable them to assess the person with the full tax which ought to be charged and no information is given to them as to the insufficiency of the statement, and the surveyor makes no objection thereto, it is provided by s. 121 that the Additional Commissioners shall direct an assessment to be made in accordance with that statement. If, on the other hand, the income tax payer makes default in delivery of that statement, or the Additional Commissioners are not satisfied with the statement which has been delivered, or the surveyor makes an objection in writing to the statement, the Additional Commissioners are required under the section to which I have referred to make an assessment on the person concerned in such sum as, according to the best of their judgment, ought to be charged on him. The Additional Commissioners, having so made an assessment, are required by s. 122 to enter that assessment in books provided for the purpose, and to make out in those books certificates of assessments accordingly. By s. 122, sub-s. 2, they are required to sign the assessments and deliver the signed assessments to the General Commissioners. Then s. 122, sub-s. 3, provides: "The assessments under Schedule D, certified and delivered by the Additional Commissioners to the General Commissioners, shall be allowed and confirmed by the General Commissioners after the time for hearing appeals against such assessments has expired." It is plain that to those words must be added as a necessary implication, "if in the meantime no notice of appeal against the assessment has been served." Where, therefore, no notice of appeal has been served against the assessment by the Additional Commissioners, the General Commissioners are under a statutory obligation to allow and confirm the assessment, and after they have so allowed and confirmed the assessment, the procedure for the purpose of ascertaining the amount of income to be taxed under Sch. D has been completed. If, on the other hand, a notice of appeal has been served by the income tax payer, the General Commissioners have no power under this section to make or to confirm or to allow the assessment, and the power to do so in that event is, as I read the Act, to be found in the sections which immediately follow s. 132 in Part VII. of the Act, which is entitled "Appeals." Where, therefore, as in the present case, the income tax payer serves a notice of appeal, it is under Part VII., and Part VII. alone, of the Act that the General Commissioners have the power to take the final step of allowing and confirming the assessment of the Additional Commissioners.

The question which we have to determine in this case is whether, when a taxpayer has served a notice of appeal, and so brought into effect the machinery designed by s. 133 for the purpose of completing the assessment, he can stop the further working of that machinery either by withdrawing the appeal or by refusing to be present at the hearing of the appeal. If that be right, and he can in that way stop the working of the machinery, then, as it appears to me, he is in a position to prevent any final assessment being made upon him at all under the Act. That would be an extraordinary intention to impute to the Legislature. In my opinion that is not the effect of the Act. The income tax payer after he has served the notice of appeal, and so brought into operation the machinery of procedure set up for it under Part VII. of the Act, has no more power to stop the machinery of procedure than he has to stop the machinery of procedure for the ascertainment of his liability to tax in any other Part of the Act.

It is not now asserted on his behalf that by withdrawing his notice of appeal, or failing to make an appearance at the hearing of the appeal, he can stop the whole of the procedure laid down in Part VII. If, for instance, the General Commissioners are not satisfied with the information before them, it is admitted that under s. 139 they have not only power, but are under a statutory obligation, to issue a precept to the taxpayer to compel him to provide them with further information. It is admitted that no withdrawal of the appeal can prevent the Commissioners from exercising that power. The precept having been issued to the income tax payer, he is under a statutory liability to make a return in accordance with that precept. If he does not, he is subjected to various penalties. If he does make a return to the precept, then the surveyor has power under s. 141 to object within a reasonable time to the schedule which has resulted from the obedience to the precept. If he does so object, then the income tax payer may appeal against that objection, and it is agreed that until that appeal has been heard no assessment can be confirmed or altered. That is the result of s. 141.

If the Commissioners decide to allow the surveyor's objection, or if the person to whom the precept has been delivered has neglected or refused to deliver a schedule in accordance with it, or if an objection has been made to the schedule by the surveyor and the objection has not been appealed against, it is admitted that under s. 145 the Commissioners are under a statutory obligation to ascertain and settle, according to the best of their judgment, the sum in which the person chargeable ought to be charged, whether the notice of appeal has been withdrawn or not. But what has been said by the appellant in the present case is that, if the Commissioners are satisfied with the assessment made by the Additional Commissioners, or if after the delivery of a schedule in accordance with the precept they are satisfied therewith, and have received no information as to its insufficiency, they have no power under s. 142 to direct the assessment to be confirmed or to be altered in accordance with any such schedule, as the case may require, because s. 142 says, in sub-s. (*b*), " on the hearing of an appeal." The argument is that, because the section says that this power of the Commissioners can be or is to be exercised at the hearing of an appeal, the appellant by withdrawing his notice of appeal, or by refusing to appear at the appeal, can prevent the Commissioners from exercising that power. I have too much respect myself for the Legislature to impute to them any such absurdity as that. I think that, once the procedure laid down in Part VII. of the Act has been brought into being, the income tax payer has no power of preventing it from being carried out to its full effect, resulting, as it will, in the assessment being confirmed either in the amount originally assessed by the Additional Commissioners, or with some variation by way of increase or diminution.

For these reasons, in addition to those which have been given by the Master of the Rolls, I think that this appeal fails and must be dismissed with costs.

GREENE L.J. : I agree.

Appeal dismissed.

Solicitors for appellant : *Mckenna & Co.*

Solicitor for Crown : *Solicitor of Inland Revenue.*

W. I. C.

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Insurance—Motor car—Untrue statement in proposal form—Accident—Correct statement in claims form—Discrepancy known to Insurer's official—Waiver.

If it is established by evidence that the duty of investigating and ascertaining facts has been delegated in the ordinary course of a company's business to a subordinate official, the company will, in law, be bound by his knowledge in the same way as it is affected by the knowledge of the board of directors.

The claimant signed a proposal form for the insurance of his motor car with the respondents. That form contained (inter alia) the following questions—" For how long has proposer and proposer's driver (i) held a driving licence, (ii) had a practical experience of motor car driving ? ", to which the answer given was " 5 years." That answer was untrue as referring to the experience of and length of licence held by the claimant. A policy was duly issued, containing a clause that the truth of the statements in the proposal form should be a condition precedent to liability on the part of the respondents. During the currency of the policy an accident occurred resulting in damage to the car and injuries to third parties, whereupon the claimant made a claim under the policy, in which, in answer to the question how long he had been driving motors, he answered, " six weeks." That document, together with the proposal form, was handed to the respondents' claims superintendent, who was authorized to deal with such matters, and was passed on by him, in accordance with the practice of the office, to a clerk for the purpose of checking the statements they contained and noting any discrepancies therein. The clerk noticed the discrepancy but did not call attention to it, considering it of no importance. Thereafter the respondents paid the claim in respect of damage to the car and certain medical expenses, and took over the negotiation of the claims by third parties, but before settling these the claims superintendent became aware of the discrepancy between the statements in the proposal form and those in the claim form, whereupon the respondents repudiated liability. In arbitration proceedings the umpire held that the respondents could not repudiate liability after having obtained the information they had received through their agents, and, notwithstanding that information, having paid the claimant and taken over the right of dealing with the third-party claims.

Held, that the umpire's finding was justified on the evidence inasmuch as the knowledge of the clerk to whom was delegated, in accordance with the ordinary practice of the office, the duty of comparing the claim form with the proposal form, must be imputed to the respondents, who were therefore not entitled in

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the circumstances to rely on the discrepancy and to repudiate liability under the policy.

Decision of Branson J. reversed.

APPEAL from a decision of Branson J. on a case stated by the umpire (Mr. F. P. M. Schiller K.C.) in arbitration proceedings.

In 1933 Mr. Evans (hereinafter referred to as the claimant) made a proposal to the Employers Mutual Insurance Association, Ld. (hereinafter referred to as the Association) for the insurance of his motor car. A proposal form which asked a series of questions and contained the usual declaration that the answers to those questions should be the basis of the contract was signed by the claimant. Question No. 2 was as follows: " (*a*) Will the car be solely driven by proposer or other named driver? If so, please give name." To that the answer was " No." " (*b*) For how long has proposer and proposer's driver (i) held a driving licence? (ii) had a practical experience of motor car driving?" To that the answer given was " Five years." Thereupon the Association issued a policy to the claimant for the period from July 31, 1933, to July 30, 1934, covering damage to the car and claims by third parties.

During the currency of the policy and while the car was being driven by the claimant an accident occurred causing damage to the car and serious injuries to a Miss Comfort, a passenger, and slight injuries to the claimant himself and to his sister, who was also in the car. A claim was made by the claimant under the policy in respect of the damage to the car, and claims were made upon him by Miss Comfort in respect of the injuries she sustained, and by Holborn Borough Council in respect of damage to their property. With regard to these latter claims, the claimant stated that in view of certain representations made to him by the Association's representatives he relinquished his right to deal with them and allowed the Association to do so. The Association paid in respect of the damage to the car, but having, as they alleged, subsequently discovered that the answer in the proposal form to question No. 2 (*b*) signed by the claimant was not true, they refused any further indemnity. The matter was then referred to arbitrators, who disagreed, whereupon the reference devolved upon the umpire, who held on the construction of the answers to question No. 2 in the proposal form that they untruthfully represented that the claimant had held a driving licence for five years and had had practical experience of driving motor cars for five years, neither of which was the case. With regard to the claimant's further contention that in any event, by reason of matters which took place after the accident, the respondents must be taken to have affirmed the contract, or to have waived their right, if any, to repudiate liability on the ground of the untrue answer to question No. 2 in the proposal, the umpire found that on a claim being made under the policy by the claimant, Mr. Anderson, a claims inspector of the Association, interviewed the claimant and was told the extent of his driving experience—namely, that he had been driving six weeks before the accident and that prior thereto he had driven at Cambridge five years before ; and that the claimant gave Anderson to understand that he had not before October, 1933, had a driving licence. In answer to the question in the claim form—" How long been driving motor cars ? " the claimant said, and Anderson wrote down, " 6 weeks." Anderson made a report on this interview to the respondents. Mr. Morice, the Association's claims superintendent, was then handed this report and claim form which he passed on to Mr. Mitchell, a clerk of the Association, to check with the proposal form and to note any discrepancies between it and the claim form, Mitchell being the servant of the Association deputed to do this work whenever a claim was sent to the London office. Mitchell, who checked the particulars in the proposal form with those in the claims form, stated that he had seen the words " 6 weeks " on the claims form and " 5 years " on the proposal form, but did not bring the fact of the discrepancy to the notice of Morice, the umpire finding that Mitchell did not do so because he did not consider it of importance. From this time the matter went on as if there were no question of repudiation and the Association paid the claimant 60*l.* in respect of damage to the car and 10*l.* 1*s.* for medical expenses of the claimant and his sister. About a month later, at an interview between Morice and solicitors acting for Miss Comfort in connection with her claim, Morice became aware of the answer "6 weeks" in the claims form, and then for the first time became personally aware of the discrepancy between the two statements. He pointed this out to Mr. Last, the joint general manager of the Association, and thereafter the claimant was informed that the Association would repudiate liability. The claimant contended that the Association had affirmed the policy and/or waived the right to repudiate it, and the Association having contended the contrary, the umpire held "that the claimant was right in his argument that the respondents in fact at all material times had knowledge that the answer to question 2 (*b*) of the proposal was untrue, that this knowledge being possessed by their servants who were deputed to receive it—namely, Anderson and Mitchell—must be imputed to the respondent company, and I hold therefore that the respondents affirmed the policy after becoming aware of the true facts and that they, by their conduct, represented that the policy was a valid policy and that the claimant on the faith of such representation relinquished his right to deal with the matters arising out of the accident and allowed the respondents to deal therewith, and that the respondents are precluded from repudiating their liability under the policy"; he accordingly held that the claimant was entitled to succeed in his claim against the respondents. The question for the opinion of the Court was whether the umpire's decision was right.

Branson J., in his judgment, said that the umpire having found that the answer "Five years" to question 2 (*b*) was untrue, the Association had a right to repudiate the contract, which was made upon the basis of the truth of the claimant's declaration unless it could be shown that they had lost the right to take up this position. It was contended on behalf of the claimant that the Association was estopped from relying on the untruth of the statement in the proposal by reason of the fact that after the untruth became known to the

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Association negotiations were continued with the claimant in respect of the accident and had caused the claimant to alter his position. For the Association it was said that though Mitchell, the clerk in their service, became aware of the falsity of the statement in the proposal, no officer of the Association charged with the decision of such a matter was aware of it until it came to the knowledge of Morice, the claims superintendent, who immediately repudiated the Association's liability. Stress was laid on behalf of the claimant on the expression used by the umpire that Mitchell was the servant of the Association deputed to do the work of detecting any discrepancy between the proposal form and the claims form and upon that the argument was founded that Mitchell was therefore specially indicated to be the person through whom the Association was to receive knowledge of any discrepancy in the documents. In his (the learned judge's) view the umpire was wrong in concluding that Mitchell's knowledge was the knowledge of the Association. With regard to Anderson, the claims inspector, he never knew at any material time that there was any discrepancy. The umpire was therefore wrong in his conclusion that the Association had knowledge that the answer to the question in the proposal form was untrue, and after becoming aware of the true facts had waived the right to repudiate the contract, and judgment must be entered for the Association.

The claimant appealed.

A. T. Miller K.C. and *Tristram Beresford* for the appellant. Branson J. was wrong in holding that the Association had not waived the right to insist upon the incorrect answer in the proposal form. The Association's official deputed by them to examine the documents became aware of the discrepancy therein and that knowledge must be imputed to the Association. The policy was therefore in force, and the Association actually negotiated with the third parties. After that the Association cannot be heard to say that the policy was avoided: *Bentsen* v. *Taylor, Sons & Co.* (1).

(1) [1893] 2 Q. B. 274, 279, 283.

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[ROCHE L.J. referred to *Wing* v. *Harvey* (1).]

In that case, as also in *Alletson* v. *Chichester* (2), the Court held that the insurance companies were affected with notice of facts which precluded them from saying that the policies had been avoided. The principle of these decisions applies to this case.

H. D. Samuels K.C. and *Roger Bacon* for the respondents. The appellant must satisfy the Court that the Association had knowledge of the untruth of the statements in the proposal form at the time they took the steps they did in negotiating with the other claimants. There cannot be a waiver without knowledge of the material facts. As was said by Avory J. in *Rex* v. *Essex Justices. Ex parte Perkins* (3): "We ought . . . . to act upon the principle laid down by Lord Romilly M.R. in *Vyvyan* v. *Vyvyan* (4) in these words: 'Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim." Here it cannot be said that the Association was fully cognizant of its rights. Moreover, means of knowledge is not sufficient to fix a company with liability; there must be actual knowledge: *In re Carew's Estate Act (No.)* 2 (5), where it was held that knowledge of a particular fact relating to the accounts by one director of a banking company was not notice to the company where the particular director had no voice in the management of the accounts: see also *Kelly* v. *Solari* (6); *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.* (7); *Newsholme Bros.* v. *Road Transport & General Insurance Co.* (8) Mitchell, who is said to have had notice of the discrepancy between the proposal and the claim was not a person who could bind the company. No responsible official of the Association had knowledge of the true facts at the material time.

Tristram Beresford replied.

Cur. adv. vult.

(1) (1854) 5 De G. M. & G. 265.
(2) (1875) L. R. 10 C. P. 391.
(3) [1927] 2 K. B. 475, 489.
(4) (1861) 30 Beav. 65, 74.
(5) (1862) 31 Beav. 39.
(6) (1841) 9 M. & W. 54.
(7) [1928] A. C. 1, 18.
(8) [1929] 2 K. B. 356, 374.

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1935. May 28. The following judgments were read :—

GREER L.J. On November 27, 1933, the appellant, Mr. R. S. Evans (hereinafter for convenience referred to as " the claimant "), accompanied by Miss Comfort, and others, was driving his Morris Isis car when he became involved in an accident which resulted in substantial damage to his motor car, serious injuries to Miss Comfort, and slight injuries to the claimant and his sister. We were told, and it was admitted, that third parties, including Miss Comfort, alleged that they had claims against the claimant for damages for negligence, but the only finding in the case stated by the umpire with reference to this matter is contained in paragraph 30 of the case where he says that the claimant on the faith of certain representations, which he found were made to him by the company's representatives, relinquished his right to deal with the matters arising out of the accident and allowed the respondents to deal therewith. I think this is meant to include the fact that claims were put forward against the claimant by Miss Comfort for personal injuries, and, as we were told, by the Holborn Borough Council for damage to their property. At the time of the accident the claimant had only been driving a motor car for six weeks, and had only held a licence as from the beginning of that period, that is to say, from some time in October, 1933. The claimant had on July 31, 1933, signed an application containing certain declarations in answer to questions put by the respondent Association (hereinafter for convenience referred to as " the Association "). The only material question and answer in the proposal form is No. 2, which is as follows :— " 2.(*a*). Will the car be solely driven by proposer or other named driver? If so, please give name. (*a*). No. (*b*). For how long has proposer and proposer's driver (i) held a driving licence? (ii) had a practical experience of motor car driving? (*b*) 5 years." With regard to the answer to this question, it is not very easy to say what the answer " 5 years " applies to. It does not seem to have been contended that it referred to the experience and length of licence held by the proposer's driver, but to

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refer to the experience and length of licence of the claimant. So understood, the answer, as the umpire has found, was definitely untrue for the reasons stated in the award. To prevent misunderstanding, I should say I do not consider the umpire's finding as being that it was consciously or intentionally untrue. At the date of the application the claimant had had no experience of driving cars except that he had occasionally driven friends' cars five years before the date on which he signed the proposal form, and that up to that date he had never had a licence. The proposal form contained the usual statement that the declaration should be the basis of the contract between the claimant and the Association.

Pursuant to this application the Association issued to the claimant their policy insuring him as therein stated as from July 31, 1933. The policy incorporated the statements contained in the proposal form as part of the contract, and provided that the truth of the statements and answers in the proposal form should be conditions precedent to any liability of the Association to make any payments under the policy. Certain instructions to the policy holder were endorsed on the policy, which called upon a policy holder whose car sustained damage, or in cases where there were claims by third parties, to supply full particulars to the Association of the occurrence on one of the Association's " Particulars of Accident " forms.

On November 30, 1933, one of the Association's claims inspectors called on behalf of the Association upon the claimant bringing with him a document which is headed: " Particulars of claim form. Particulars of accident." This document, like the proposal form, contained a number of questions for the insured person to answer. In it the claimant stated his name in full, and that he was the person driving at the time of the accident. In answer to the question " How long [have you] been driving motors ? " with the authority of the claimant the inspector wrote: " Six weeks," and the claimant signed the form, which is a document addressed to the Association. When this form was read by an employee of the Association who was authorized to deal with claims, it was at once understood as meaning that the claimant's experience as a driver did not exceed six weeks, and that his statement in the proposal form that he had had five years' driving experience, and had held a licence for five years, was untrue. The claim form with particulars of accident was taken by Mr. Anderson, the claims inspector mentioned above, to the Association's head office in London, and given to a Mr. Morice, the Association's claims superintendent. Before stating what happened to the claims form afterwards, it is worth noting that Anderson was definitely told by the claimant that he had only been driving for six weeks, and that he had had no licence except the one he obtained in October, at the beginning of the six weeks. Anderson had, of course, not present to his mind, if he had ever seen them, the declarations contained in the proposal form, but I think it may be assumed that he visited the claimant not merely with the object of having the claimant's form filled in, but with the object of ascertaining on behalf of the Association whatever information he could obtain from the claimant relevant to the question whether they should admit or dispute the claim. Be that as it may, it seems clear that the man to whom he gave the claim form, Mr. Morice, was an employee of the Association authorized to receive the information contained in the form. According to the finding of the umpire he followed the usual practice of the Association in handing the form to Mr. Mitchell, a clerk in the employ of the Association, to check over the statements in the claim form with those contained in the proposal form, and to note any discrepancies between the proposal and claim form. To do this was in the ordinary course of Mitchell's duty. Mitchell did notice the discrepancy, but did not call attention to it because he did not consider it of importance. It seems obvious that the claimant in stating his experience as only extending to six weeks was in all probability stating the truth, and not understating his experience, as it could not be in his interest to understate his experience. It seems to me involved in the findings of the umpire that the statements in the claim form, interpreted by any reasonable person, when compared with the proposal form, meant that the statements in the proposal form were untrue in two respects, namely—that the claimant had not had practical experience of motor car driving for five years, nor had he had a licence for five years.

On January 12, 1934, the Association paid the claimant 60*l.* for damages to his car in accordance with the terms of the policy, and on January 17, 1934, 10*l.* 1*s.* for the medical expenses of the claimant and his sister. Thereafter they took upon themselves, pursuant to condition No. 2 endorsed on the policy, the conduct of all negotiations with the third parties for the purpose of settlement of or defence to their claims. On February 22, 1934, Morice had an interview with a member of a firm of solicitors who were acting for Miss Comfort to discuss this lady's claim for damages against the claimant. At the interview the solicitor for Miss Comfort stated that the claimant was a reckless driver and had had very little experience of driving. After this interview Morice compared the claim form with the proposal form, became aware of the discrepancy between the two documents, and pointed it out to the General Manager of the London office. The Association then repudiated liability. It is to be observed that neither Mr. Morice nor the General Manager had the slightest doubt that the statements in the claim form informed them when they looked at the proposal form that a condition precedent had been broken by the claimant which entitled them to repudiate liability.

The above summary of the facts is taken from the special case stated by Mr. Schiller K.C., upon whom devolved the decision of this case under the arbitration clause contained in the policy. The umpire decided that the Association could not repudiate their liability under the policy after having received the information they received through their agents, Anderson, Morice and Mitchell, and notwithstanding that information paid the claimant and taken to themselves the right of dealing with the third party claim. The umpire does not use the word "waiver," but I think his decision amounts to a decision that by their conduct the Association affirmed the policy after notice of the facts which entitled them to repudiate, and thereby waived their right to repudiate liability under the policy. The question he states for the Court is whether his decision is correct, which necessarily means correct in law. In my judgment it is correct, or to put it the other way, it is not wrong in law, for two reasons. First, I think the knowledge of Mitchell, to whom in the ordinary course of their business the Association entrusted the duty of comparing the claim form with the proposal form so as to ascertain whether there was any discrepancy between them, fixes the Association with the knowledge of that which came to the knowledge of Mitchell. Secondly, I think the award of the umpire was right because the Association are not entitled in law to say that they were not aware of the contents of documents such as the proposal form and the claim form, which at their request the claimant addressed to them. They must be treated as having received the information contained in these two documents, and they cannot be heard to say that they did not know their contents. A limited company cannot know anything itself except through its agents or servants. The knowledge which is to be attributed to a company must be the knowledge of some agent or servant. If there be no evidence that the company has delegated the ascertainment of relevant facts to some officer of the company, it may well be that nothing short of knowledge by the Board of Directors will bind the company. But the knowledge of the directors is attributed to the company because they are agents of the company to whom the duty of knowing the particular facts in question has been delegated by the company. If it be established by evidence that the duty of investigating and ascertaining the facts has been delegated in the ordinary course of the company's business to a subordinate official, the company will in law be bound by his knowledge for the same reasons that it is affected by the knowledge of the board of directors. In my judgment the umpire was entitled to infer from the facts found by him and stated in the special case that the Association were bound by the knowledge obtained by Mitchell in carrying out the duties entrusted to him in the ordinary course of the conduct of the business of the Association. It would be impossible for an insurance company's business to be carried on if they did not delegate to officials the duty of exercising their contractual rights in considering and deciding what course to take with reference to claims which have to be dealt with from day to day.

The decision of the umpire in favour of the claimant can be supported on the above ground, and it is therefore, in my judgment, not incorrect in law either on the claim or counterclaim.

There is, moreover, an alternative ground on which the umpire's decision can be supported. The claim form was sent to the Association by their own request. If the claimant had written a letter to the Association stating that he had only had six weeks' experience of driving motor cars at the date of the accident, after the Association had asked him to send the information by letter, I am of opinion that the Association would be fixed with notice of the statements contained in the letter. The Association could not say they had no knowledge of its contents because no authorized official read it. The communication would be a communication to the Association, and they could not in law be entitled to say they did not know the contents of the letter because it was handed over to the wrong official to consider and to deal with the information it contained. In the present case the relevant information was not sent by letter, but was sent on a form addressed to the Association which the claimant undertook to send to them in the case of immediate repairs being required, and which in any event he was instructed to send to the Association by the instructions endorsed on the policy. I cannot think that the Association can be allowed to deny knowledge of the contents of a document they asked the claimant to fill up and send to them, on the ground, if such be the case, that the document was never read by the official authorized to read it and act on the information contained in it.

I have considered the authorities cited in argument in support of the Association's case, but I do not think it necessary to refer to them except by saying that they have, in my judgment, no application to the present case, which falls to be decided on the special facts stated expressly or by implication in the special case. Some of the decisions afford definite support for the appellants' contentions—see especially *Wing* v. *Harvey*. (1) I have had an opportunity of reading Slesser L.J.'s judgment, where the facts and the decision in *Wing* v. *Harvey* (1) are accurately summarized. Support can also be found for the present judgment in the words of Lord Dunedin in his speech in *Houghton & Co.* v. *Nothard, Lowe & Wills, Ld.* (2)

The appeal will be allowed with costs here and below, and the question put by the umpire will be answered by saying that his decision is correct in law.

SLESSER L.J. In this case the facts have been stated by my Lord, and I do not think it necessary to repeat them.

In my opinion, the fundamental question in this case is whether the knowledge which Mr. Mitchell acquired in comparing the claim form with the proposal form thereby became the knowledge of the respondent company.

It is true that in *Houghton's* case (3) Lord Sumner points out that " the mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks." And, again, " the knowledge, which is relevant, is that of directors themselves, since it is their board that deals with the company's rights." But it must depend upon the facts of each case, where the matter is not specially determined by the articles, by what particular means of information and in what circumstances a company may properly be said to acquire knowledge, or have knowledge thrust upon them. In this case, as to the two documents themselves, the proposal form and the claim form, it cannot in any view be said that the company did not know their several contents since both were addressed to the company; but the correlation of the two, leading to discrepancy and consequent falsity of the claimant's first statement, depended solely upon the investigations of Mr. Mitchell. Now, Mr. Mitchell was not a mere clerk: it

(1) 5 De G. M. & G. 265.
(2) [1928] A. C. 1, 14.
(3) [1928] A. C. 1, 18.

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was his specific duty to do the very act of comparison which here resulted in his ascertainment of the conflict between the claimant's two statements. He carried out his duty and he made the comparison, and the fact that he did not think fit to convey the information so obtained to Mr. Morice or Mr. Last, who were the persons who properly decided that the company should deal with the matter, does not enable the company, in my judgment, to deny that they were bound by the knowledge which he obtained in carrying out duties entrusted to him, albeit negligently performed, by the company through Mr. Morice. The history of the dealings between Anderson and Evans points to the same conclusion.

In *Newsholme Bros.* v. *Road Transport & General Insurance Co.* (1), Scrutton L.J., quoting Lord Sumner, says: "The knowledge of a person who acquires it in a breach of duty, and is guilty of a breach of duty in respect to it, is not to be imputed to a company to whom, from the hypothesis, he would be very unlikely to disclose it in fact." In this case, so far from acquiring the knowledge in breach of duty, Mr. Mitchell acquired it in the course of his duty and, but for an erroneous estimate of its significance, he would in the ordinary course of his work have communicated it to Mr. Morice or Mr. Last, who were the persons, as I have said, who were competent, and in fact decided on behalf of the company to maintain the action in place of the claimant. I think that the knowledge of Mr. Mitchell must be imputed to Mr. Morice, to Mr. Last and to the company, and that the company cannot escape merely because Mr. Mitchell was negligent in the performance of it. If Mr. Morice had such imputed knowledge it follows, as the learned umpire has found, that he, with such knowledge of the untruth, on behalf of the company affirmed a policy after the company had notionally become aware of the true facts, and if the claimant thereupon relinquished his rights to deal with the matters arising out of the accident and allowed the company to deal with them by subrogation or otherwise, the company are precluded from repudiating their liability: see *Bentsen* v. *Taylor, Sons & Co.* (2), per Bowen L.J.

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(1) [1929] 2 K. B. 356, 374.

(2) [1893] 2 Q. B. 274, 283.

The case of *Forder* v. *Great Western Ry. Co.* (1), was, as Lord Alverstone said, "very near the line," but Kennedy J., speaking of the knowledge to be imputed to a railway company by acts of its officials, says (2): "In my opinion, the knowledge which is necessary . . . . must be knowledge on the part, not of some official of the company . . . . but of the person who under the rules of the company is engaged in, or is entrusted with the control of, the transaction." The case was dealing with misconduct, but this opinion fortifies my view that once it was established that Mr. Mitchell was so performing his duty the company acquired the knowledge which he obtained notwithstanding the fact that he did not think it worth while to communicate the information which he had acquired to his superiors.

The case of *Wing* v. *Harvey* (3) is also in point. There, the agent of an insurance company received payments from a gentleman outside Europe without objection, though there was a clause in the policy making it void if the assured went beyond the limits of Europe without licence. The assignee of the policy, on paying the premium to a local agent at the place where the assurance had been effected, informed him that the assured was resident in Canada; the agent stated that this would not avoid the policy and received the premiums until the assured died. The office in London received the moneys in their turn, without having notice of the assured's residence beyond the prescribed limits. Knight-Bruce L.J. was of opinion that whether the agent did or did not inform them in fact of the true state of circumstances in which the premiums were paid to him, the directors became, and were, as much bound as if the premiums had been paid directly to themselves, they knowing at the time on each occasion the place of the assured's residence. And Turner L.J. was of opinion that "the office was affected with notice of the absence of [the assured] beyond the boundaries limited by the policies."

For these reasons I agree with Greer L.J. that this appeal must be allowed and the award of the learned umpire upheld.

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(1) [1905] 2 K. B. 532.

(2) Ibid. 537.

(3) 5 De G. M. & G. 265.

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ROCHE L.J. I agree that this appeal should be allowed. We are differing from the view of the learned judge and are holding that the contrary view of the learned legal umpire was right in law. It is therefore clear that the points involved are of some difficulty and nicety, and I propose to state shortly in my own way the reasons which lead me to the conclusion that the umpire was right, and that the judge should have so held.

The provisions in the contract of insurance as to the truth of the statements in the proposal made by the assured were of unilateral operation in favour of the insurance company, and could be waived by that company: see *Wing* v. *Harvey*.(1)

In *Bentsen* v. *Taylor, Sons & Co.* (2), Bowen L.J. stated the principles governing waiver in such a case, in language that has often been quoted with approval, as follows: "In order to succeed, the plaintiff must show, either that he has performed the condition precedent, the onus being on him, or that the defendants have excused the performance of the condition, and we have to consider whether the plaintiff has sustained that burthen, so that no reasonable man could doubt that there has been a waiver of the condition or an excuse of its performance. In other words, did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent, but that they only intended to rely on the misdescription as a breach of warranty, treating the contract as still open for further performance? Did the defendants lead the plaintiff to believe that they intended to treat the misdescription as a breach of contract only, and not as a failure to perform a condition precedent?"

The umpire has found in the present case the following facts: "On these contentions I hold that the claimant was right in his argument that the respondents in fact at all material times had knowledge that the answer to question 2 (*b*) of the proposal was untrue, that this knowledge being possessed by their servants who were deputed to receive it—

(1) 5 De G. M. & G. 265.

(2) [1893] 2 Q. B. 274, 283.

namely, Anderson and Mitchell—must be imputed to the respondent company, and I hold, therefore, that the respondents affirmed the policy after becoming aware of the true facts and that they, by their conduct represented that the policy was a valid policy and that the claimant on the faith of such representation relinquished his right to deal with the matters arising out of the accident and allowed the respondents to deal therewith and that the respondents are precluded from repudiating their liability under the policy." The facts so found by the umpire in law justified his conclusion unless he was not justified in law in arriving at that part of his finding which refers to and finds knowledge of the true facts on the part of the company. In my opinion he was so justified and the company had the necessary knowledge.

Certain material questions contained in the claim form were directed to ascertaining whether the statements in the proposal form were true. The answers stated the truth and showed that the statements in the proposal form were untrue in the sense that they were inaccurate. I agree with my Lord that if such information is invited by a company and is given and communicated to that company in the manner invited, that fact alone would be sufficient. But in this case the matter does not rest there. There are further findings of the umpire which make the matter even plainer. It was conceded that if the matter came to the notice of Mr. Morice that was sufficient. It is unnecessary, therefore, to consider any question of the directors' knowledge, and for other reasons I do not deem it to be necessary to consider Mr. Anderson's knowledge. As to Mr. Morice, the answers of the claimant in the claim form came to his knowledge in the sense that he knew that the questions were answered, but he deputed, as was his practice and proper practice, the ascertainment of the nature and effect of the answers and the existence of discrepancies, if any, between the proposal and claim forms, to his clerk, Mitchell. Mitchell obtained the necessary knowledge but failed to appreciate its importance, or to pass it on, as he ought to have done, to his superior, Mr. Morice. The company therefore acquired the knowledge through the

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very person appointed to acquire it, and if it failed to use it the failure was due to that person's default. Cases in which knowledge was acquired by a company for other purposes and by other persons than those concerned with the particular matter under enquiry have no application to the present case: see *Houghton & Co.* v. *Nothard, Lowe & Wills, Ld.* (1); per Lord Sumner in the passage already cited by Slesser L.J. The test is well laid down by Lord Dunedin in the same case as follows (2): "The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties." In this case this matter which was under discussion was in the ordinary domain of the duties of Mr. Morice and Mr. Mitchell, and the responsibilities with regard to it were distributed between them in the manner I have above stated. To depute and refer to subordinates matters of detail is essential for the conduct of business on any large scale by companies or others; and if an official of a company such as Mr. Morice does properly so depute any matter to a subordinate, and the subordinate deals with it, it is as if Mr. Morice dealt with it for himself, and the same consequences follow in the one case and the other.

In my judgment the consequence here is that the umpire's decision that the claimant was entitled to succeed was right, and the appeal should, therefore, be allowed with costs.

Appeal allowed.

Solicitors for appellant: *Theodore Goddard & Co.*
Solicitors for respondents: *Ponsford & Devenish.*

J. S. H.

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(1) [1928] A. C. 1, 18.

(2) Ibid. 14.

Distinguished. *Re* A SOLICITOR.
[1951] 1 All E.R. 592.

In re TAXATION OF COSTS.

In re A SOLICITOR.

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Jan. 24;
March 3.

Costs—Taxation—Counsel's fees unpaid at commencement of taxation—"Fees, charges and disbursements"—Items disallowed as relating to business for which client had given no retainer—Whether one-sixth of amount of bill taxed off—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Solicitors Act,* 1932 (22 & 23 *Geo.* 5, *c.* 37), *s.* 66—*R. S. C., Order* LXV., *r.* 27, *reg.* 29*a.*

For the purpose of taxation of a solicitor's bill under the Solicitors Act, 1932, the phrase "costs due to a solicitor" in s. 65, sub-s. 1, must be deemed, having regard to the definition of "costs" in s. 81, to include "disbursements" due from the client to the solicitor, which means actual payments before delivery of the bill, and any sums claimed in the bill as disbursements, e.g., fees to counsel, which have not been paid before its delivery, must be disallowed.

The Solicitors Act, 1932, has not made any alteration in the law in this respect, and reg. 29*a* of Order LXV., r. 27, is still in force.

Sadd v. *Griffin* [1908] 2 K. B. 510 followed.

Where items in a solicitor's bill are struck out of it on taxation at the instance of the client, because the business to which the items relate was never included in any retainer given to the solicitor by the client, those items cannot be taken into consideration for the purpose of estimating whether one-sixth of the amount of the bill has been taxed off under s. 66, sub-s. 5, of the Act of 1932.

White v. *Milner* (1794) 2 H. Bl. 357 and *Mills* v. *Revett* (1834) 1 A. & E. 856 followed.

APPEAL from a decision of Singleton J. upon a taxation of costs.

The following statement of facts is taken from the judgment of Scott L.J.:—

"The appellant, Mr. Griffith, is a solicitor, whose bill of costs was taxed pursuant to an order of Master Ball dated November 9, 1934, at the instance of the client, Mr. Sudbury. The total bill was for 1670*l.* in respect of work done and disbursements made between September, 1929, and June, 1931. It was addressed to Mr. Sudbury and a Mr. Green jointly, and was made out on the footing that the two gentlemen were jointly concerned as clients in all the matters included in the bill. On the taxation, however, Mr. Sudbury, through his solicitors, took the point that certain portions of the bill related to Mr. Green's separate business and that he, Mr. Sudbury, had given Mr. Griffith no retainer entitling him to treat those items as items for which he, Mr. Sudbury, had incurred personal liability. The Taxing Master decided in Mr. Sudbury's favour on this contention, and deducted 317*l*. from Mr. Sudbury's bill on the ground that the items related to matters with which Mr. Sudbury had no concern quoad taxation of costs. Apart from this excision from the bill of the 317*l*. the Taxing Master taxed off various items which, if added to the 317*l*., gave a resultant deduction amounting to more than one-sixth of the total of the bill. The Taxing Master took the view that the 317*l*. ought to be treated as items 'taxed off' within the meaning of the Solicitors Act, 1932, s. 66, sub-s. 5 (1), and he consequently ordered the solicitor to pay the costs of the taxation pursuant to the direction of that sub-section, as he certified no special circumstances within the proviso.

Amongst the items taxed off were certain disbursements of counsel's fees amounting to 90*l*. in all. Although these fees had been paid before the items were reached in the course of the taxation, they had not been paid before the bill was delivered, nor even before the commencement of the taxation. The bill of costs did not contain any statement that the disbursements to counsel had not been made, so as even in form to bring them within the exception relating to unpaid disbursements which reg. 29*a* of R. S. C., Order LXV., r. 27 (1), purports to allow.

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(1) Solicitors Act, 1932, s. 65, sub-s. 1: "Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered in accordance with the requirements of this section. . . . ."

Sect. 66, sub-s. 1: "On the application, made within one month of the delivery of a solicitor's bill, of the party chargeable therewith, the High Court shall . . . . order that the bill shall be taxed and that no action shall be commenced thereon until the taxation is completed."

Sub-s. 5: ". . . . the costs of the taxation shall be paid according to the event of the taxation, that is to say, if one-sixth of the amount of the bill is taxed off, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs. . . . ."

Sect. 81: "In this Act, unless the context otherwise requires—

'Costs' includes fees, charges, disbursements, expenses and remuneration."

The Solicitors Act, 1843, was repealed by the Solicitors Act, 1932.

On these facts the Taxing Master decided two points against the solicitor: (1.) He 'taxed off' the 90*l.* for counsel's fees on the ground that they had not been paid before the delivery of the bill of costs, and further that there was no statement in the bill saying that they had not been paid, and anyhow that they had not been paid 'before the commencement of the taxation,' as required by the regulation. (2.) In regard to the one-sixth rule of s. 66, sub-s. 5, of the Solicitors Act, 1932, he held that the 317*l.* of items which he had disallowed as improperly included in a bill addressed to Mr. Sudbury had, none the less, been 'taxed off' by him within the meaning of the statute. As this meant that more than the statutory sixth had been 'taxed off,' he ordered the solicitor to pay the costs of the taxation.

Objections were brought in by Mr. Griffith against both decisions, but were overruled by the Taxing Master in his answers.

An appeal was brought to the judge in Chambers on both points, and by order of December 17, 1935, Singleton J. dismissed the appeal with costs. From that decision the solicitor appealed to the Court of Appeal."

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(1) Rules of the Supreme Court, Order LXV., r. 27, reg. 29*a*: "In taxations under or pursuant to the Solicitors Act, 1843, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before the delivery of the bill of costs, unless the bill shall expressly state that they have not then been made, and shall set out such unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed by the taxing master if they are actually made before the commencement of the proceedings in which the taxation takes place, and are made in discharge of an antecedent liability of the solicitor (including counsel's fees) properly incurred on behalf of the client. For the purposes of computation of one-sixth thereof, such bill shall be deemed to include such unpaid items as part of the bill.

Provided also that if the proceedings for taxation shall have been commenced by the client or a third party, payments made by the solicitor pending such proceedings in discharge of any such antecedent liability so set out in the bill (including counsel's fees) may be allowed by the taxing master if actually made before the commencement of the taxation, if it appears to him that such payments have been properly made and that no injustice is done thereby. . . . ."

Gillis for the appellant. The first point raised by the appeal is with regard to counsel's fees which have been disallowed by the Taxing Master under Order LXV., r. 27, reg. 29*a*, on the ground that they had not been paid at the commencement of the taxation, although they were paid before vouchers were required to be produced. Reg. 29*a* is not binding in law because it is inconsistent with the provisions of the Solicitors Act, 1932, and therefore must be considered as having been repealed by that Act. The regulation was framed under s. 37 of the Solicitors Act, 1843, where the expression used was "a bill of such fees, charges, and disbursements," the same expression being used in reg. 29*a*. It was held in *Sadd* v. *Griffin* (1) that for the purpose of taxation of a solicitor's bill under the Solicitors Act, 1843, "disbursements" means actual payments before delivery of the bill, and any sums claimed in the bill as disbursements, e.g., fees to counsel, which have not been paid before its delivery, must be disallowed. Many of the hardships produced by the meaning given to the term "disbursements" in *Sadd* v. *Griffin* (1) were mitigated by reg. 29*a*, and have now completely disappeared owing to the different language used in the Solicitors Act, 1932. The Courts have not been eager to extend *Sadd* v. *Griffin* (1) to other cases. In the Solicitors Act, 1860, power was given to Courts by s. 28 to declare a solicitor entitled to a charge upon the property recovered for the taxed "costs, charges and expenses" in reference to such proceeding. It was held in *Watkins* v. *Eden* (2) that for the purpose of taxation of a solicitor's bill under s. 28 of the Act of 1860 "costs, charges and expenses" might include fees to counsel which had not been paid before the delivery of the bill or the commencement of taxation. The judgment proceeded on the ground that the term "disbursements" was not used in the Act of 1860 but "expenses," and *Sadd* v.

(1) [1908] 2 K. B. 510.
(2) [1920] 2 K. B. 333.

Griffin (1) was distinguished. There is no provision in the Act of 1932 which corresponds with s. 37 of the Act of 1843, and therefore there is no provision which keeps alive that section. Sect. 66 of the Act of 1932 is the nearest approach to s. 37 of the Act of 1843. But s. 66 of the Act of 1932 speaks of the taxation of a solicitor's bill and s. 65 speaks of an action to recover solicitors' costs, the word "disbursements" not being used. Under s. 66 any item in a solicitor's bill can, subject to the client's defence, be recovered from the client. No objection can now be taken to items in a bill for counsel's fees on the ground that they were not paid before the commencement of taxation if they have been paid before vouchers are called for. The definition of "costs" in s. 81 of the Act of 1932 is intentionally very wide and includes the effect of the decision in *Watkins* v. *Eden* (2), upon which case the appellant relies.

[Greer L.J. Reg. 29*a* has effect now by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99. It has not been expressly repealed.]

The second point is whether the client has succeeded in taxing off one-sixth of the bill delivered to him, so as to entitle him under s. 66, sub-s. 5, of the Solicitors Act of 1932 to the costs of the taxation. The Taxing Master has held that more than one-sixth of the bill has been taxed off because he has included in the items taxed off certain items amounting to 317*l.* which he has deducted, having held, in accordance with Mr. Sudbury's objection, that they related to Mr. Green's separate business and that Mr. Sudbury had not given the solicitor any retainer entitling him to treat those items as items for which Mr. Sudbury had incurred personal liability. But where items in a solicitor's bill are struck out of it at the instance of the client because the business in question was never included in any retainer given by the client those items ought not to be taken in consideration in estimating whether one-sixth of the bill has been taxed off: see *White* v. *Milner* (3) and *Mills* v. *Revett*. (4) The decision of Leach V.-C. to the opposite effect in *Rigby* v. *Edwards* (1) is of no authority, as it was subsequently overruled by Lord Eldon L.C. (2)

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(1) [1908] 2 K. B. 510.
(2) [1920] 2 K. B. 333.
(3) 2 H. Bl. 357.
(4) 1 A. & E. 856.

Constantine Gallop for the respondent, Sudbury. The disallowance by the Taxing Master of counsel's fees under reg. 29*a* of Order LXV, r. 27, on the ground that they had not been paid before the bill was delivered was a proper disallowance. Reg. 29*a* has not been repealed by the Solicitors Act, 1932. That Act is a consolidating Act, and the presumption is that " a consolidating Act is not intended to alter the law " : per Scrutton L.J. in *Gilbert* v. *Gilbert*. (3) Reg. 29*a*, although framed under the Solicitors Act, 1843, has force by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99, sub-s. 1 (*e*). The Solicitors Act, 1932, is really a re-enactment of the earlier statutes of 1843 and 1860 in different terms. The Act of 1932 speaks in s. 65 of the " costs due to a solicitor," and " costs " by the definition of that term in s. 81 includes " disbursements." It was held in *Sadd* v. *Griffin* (4) that for the purposes of taxation under the Solicitors Act " disbursements " means actual payments before the delivery of the bill, and that any sums claimed in the bill as disbursements and not paid before its delivery must be disallowed. It was pointed out in that case that counsel's fees are in law gratuities and therefore they cannot be costs due to a solicitor until he has paid them. A solicitor is not entitled to include in his bill of costs as disbursements counsel's fees until he has paid them. Scrutton L.J. pointed out in *Watkins* v. *Eden* (5) that the rule that counsel's fees must be paid before delivery of the bill did not apply to a taxation under the Solicitors Act, 1860, which was to quantify the amount of costs, charges, and expenses for which a charge is given without an order for personal payment, because such a taxation was in the same position as a party and party taxation, where it is enough that the expenses are paid before the allocation is given.

Whether the Taxing Master applied the right principle with regard to the disallowance of items amounting to 317*l.* in the bill addressed to Sudbury on the ground that they had been improperly included in that bill depended upon the facts before him. Whether he was right or wrong with regard to those items, more than one-sixth will be taxed off the bill and therefore the solicitor will have to pay the costs of the taxation.

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(1) (1820) 5 Madd. 20.

(2) See Beames on Costs (2nd ed. pub. in 1840), pp. 255–260.

(3) [1928] P. 1, 8.

(4) [1908] 2 K. B. 510, 513.

(5) [1920] 2 K. B. 344.

Gillis replied.

Cur. adv. vult.

1936. March 3. SLESSER L.J. The judgment of the Court will be delivered by Scott L.J.

SCOTT L.J. read the following judgment: This is an appeal from Singleton J. on a question of costs pursuant to leave granted in part by him on December 17, 1934, and in part by the Court of Appeal on December 20. [He then stated the facts set out above, and continued.]

Nothing turns on the particular figures in the case, and they need not be investigated; but on each of the two points in dispute questions of general importance arise.

It will be convenient to dispose of the point about counsel's fees first. On this Mr. Gillis for the appellant contended that the prohibition on the inclusion in a bill of costs of unpaid disbursements contained in Order LXV., r. 27, reg. 29*a*, had, since the Solicitors Act, 1932, become inoperative on the ground that it is inconsistent with and therefore ultra vires the provisions of that Act. He pointed out that the regulation had been framed under s. 37 of the Solicitors Act, 1843; but that that Act had been repealed by the Act of 1932, and his submission was that, although the present Act purports only to be a codifying Act, it in fact contains no section equivalent to s. 37 of the Act of 1843. We think this argument is unsound. It is true that the text of reg. 29*a* uses the phrase "fees, charges and disbursements" which was contained in s. 37 of the repealed Act of 1843, and indeed that in the White Book of 1936 there is a marginal note referring to the Solicitors Act of 1843 as if that Act were still unrepealed.

But the argument that s. 37 of the Act of 1843 is not re-enacted in the Act of 1932 does not pay sufficient attention to the actual language of the present Act. By the definition contained in s. 81, sub-s. 1, the words " fees, charges and disbursements " are to be read into the word " costs " wherever it is used in the Act ; and the substantive enactment of s. 65, sub-s. 1, runs as follows : " Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered in accordance with the requirements of this section." Having regard to the definition, the phrase " costs due to a solicitor " must in the case of disbursements be interpreted as meaning disbursements due from the client to the solicitor. If so the section has precisely the same wording as s. 37 of the Act of 1843, or indeed as s. 23 of the Act 2 Geo. 2, c. 23, which s. 37 of the Act of 1843, so far as relates to this point, re-enacted, and the Act of 1932 has therefore made no change in the law. A " disbursement " charged by a solicitor against his client for counsel's fees must always have meant a disbursement actually made—money paid out of the pocket of the solicitor—since ex hypothesi counsel's fees, being in law mere gratuities, and not constituting a debt from the solicitor to the barrister, cannot be " due " from the client to the solicitor until the latter has actually paid counsel. That this was so under the wording of the Act of 1843 was made perfectly clear by the judgment of this Court in the case of *Sadd* v. *Griffin* (1) ; and since the words " costs due to a solicitor " in s. 65 have the same meaning, a solicitor is still prohibited from putting into his "bill thereof" any "disbursement" in respect of counsel's fees which he has not already paid, or at any rate unless at latest he pays it before delivering his bill to his client.

What then is the true position in regard to the argument that reg. 29*a* is ultra vires ? Clearly its first four lines are just as consistent with the new Act as with the old : that part is not ultra vires. In regard to lines 4 to 11 of the regulation we need not consider the question of ultra vires, for nothing

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(1) [1908] 2 K. B. 510.

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in this appeal turns upon that part; but we must not be understood to express any affirmative view that that part of the regulation can have the effect of authorizing the inclusion in the bill of costs of any disbursement which is not "due" as a legally enforceable debt from the client to the solicitor. In the case of counsel's fees there cannot be any debt until after actual payment by the solicitor to counsel. To enter unpaid counsel's fees in the bill of costs under the permissive words of the regulation would be a direct violation of the prohibition of the statute. The wording of the regulation should be considered by the Rule Committee. On this first point the appeal must be dismissed.

On the second question we think the appellant is entitled to succeed. The case of *Mills* v. *Revett* (1) and the older case of *White* v. *Milner* (2) are clear authority for the proposition that where items in a solicitor's bill are struck out of it at the instance of the client because the business in question was never included in any retainer given by him, those items ought not to be considered for the purpose of estimating the one-sixth taxed off under s. 23 of 2 Geo. 2, c. 23, or s. 37 of the Act of 1843. The case of *Rigby* v. *Edwards* (3), a decision of Leach V.-C. to the opposite effect, is not an authority, as the Vice-Chancellor's decision was overruled by Lord Eldon as Lord Chancellor, as appears from the note in Beames on Costs (2nd ed. published in 1840), pp. 255–260. In that appeal Lord Eldon said, p. 257: "What they have said in the common law courts is this, you shall not come here and say, the Master has taken off more than a one-sixth, when you yourself state not that he has taken it off, but that you have taken it off. The Vice-Chancellor, however, decided differently," and on p. 259: "That principle is intelligible enough, that if A. B. objects against C. D. considering as part of a taxable bill the costs of a certain suit in that bill, he cannot be heard to say, that that has been taxed, which he has objected should not be taxed at all. Looking to the decisions on the statute, there appeared to be

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(1) 1 A. & E. 856.
(2) 2 H. Bl. 357.
(3) 5 Madd. 20.

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a good deal of justice in that; and it struck me, that what was thus struck out of the bill was struck out not upon taxation, but on quite a different ground; and the costs, therefore, ought not to be paid by the attorney."

On p. 260 the learned editor adds a note: "This case was afterwards disposed of by Lord Eldon. He said, the practice of the clerks in Court was one way: the opinion of the judges at law, the other way. He thought the judges right; and should, therefore, follow them; and he made the order accordingly following the case of *White* v. *Milner.* (1)"

We think that the phrase "taxed off" contained in the Solicitors Act, 1932, means a reduction of the bill by the Taxing Master where the business involved is within the retainer, and not where the client says: "This is business with which I have no concern, it ought never to have been in the bill at all." On this footing the 317*l.* odd of items which concerned Mr. Green and did not concern Mr. Sudbury at all, ought not, for the purpose of calculating the one-sixth, to have come into the calculation at all. On this point the appeal succeeds.

As the appellant has succeeded on one point and failed on the other we think that the appellant should be paid half his costs here and below, including costs of objection, and the bill remitted to the Taxing Master accordingly.

Solicitors for appellant: *Percy Bono & Griffith.*
Solicitors for respondent: *Phillips, Bennett & Co.*

R. F. S.

(1) 2 H. Bl. 357.

DERBYSHIRE COUNTY COUNCIL *v.* MIDDLESEX COUNTY COUNCIL.

1935
Oct. 8, 9.

Poor Law—Settlement and Removal—Period of Residence—Continuity—Man of the Territorial Force—Absence from place of residence while attending annual camp—Whether in service of Crown as a soldier—Territorial and Reserve Forces Act, 1907 (7 *Edw.* 7, *c.* 9), *s.* 2, *sub-s.* 2 (*a*)—*Poor Law Act*, 1930 (20 *Geo* 5, *c.* 17), *ss.* 86, *sub-s.* 1; 93, *sub-s.* 1 (*a*).

By s. 86, sub-s. 1, of the Poor Law Act, 1930: "Where a person has resided for the term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained in this Act, render him irremovable, he shall be deemed to be settled in that county or county borough."

By s. 93, sub-s. 1: "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order: Provided that any time during which he has been—(*a*) serving in the . . . . military . . . . service of Crown as a . . . . soldier . . . . shall for all purposes be excluded in the computation of time hereinbefore mentioned":—

Held, that a poor person who had enlisted as a man of the Territorial Force, was not, while attending the annual training camp of that Force, serving in the military service of the Crown as a soldier within the meaning of proviso (*a*) of s. 93, sub-s. 1, of the Poor Law Act, 1930. The period of his attendance at the camp was not to be excluded in computing his period of residence, so as to prevent him from acquiring a settlement in a county borough by residence in that county borough for a term of three years within the meaning of s. 86, sub-s. 1, of the Act.

Horton Overseers v. *Leeds Overseers* (1855) 5 E. & B. 595; 25 L. J. (M. C.) 38, considered.

CASE stated by Middlesex justices.

On a complaint made by the Middlesex County Council, under s. 95 of the Poor Law Act, 1930, an order was made by Middlesex justices directing the removal of one A. P. Booth ("the poor person") to the county of Derby as the place of his last legal settlement.

The question was whether the administrative county of Derby was the last place of legal settlement of the poor person. It was agreed between the parties that the issue depended on the further question whether a period of fourteen days during which the poor person was attending an annual training camp of the Territorial Force as a member of that force was a period during which he was "serving in the . . . . military . . . . service of the Crown as a . . . . soldier . . . ." within the meaning of s. 93, sub-s. 1 (*a*), of the Poor Law Act, 1930, so as to be excluded in the computation of the time of the residence of the poor person and prevent him from having resided for a term of three years in a county borough in such manner as in each of those years would have rendered him irremovable within the meaning of s. 86, sub-s. 1, of the Act of 1930.

It was conceded by both parties that if such period must be excluded, the county of Derby was the last place of legal settlement of the poor person; but that if such period was not to be excluded under the Act, his temporary absence for fourteen days would not amount to an interruption of residence, and the poor person had acquired by residence for a term of three years in the county borough of Sheffield a legal settlement in that area constituting for the purposes of this case a legal settlement later than his legal settlement in the county of Derby.

The poor person was born in Bradford in 1889 and came to Chesterfield, in the administrative county of Derby, to live with his parents in or about the year 1896.

The father of the poor person died in 1901 and the poor person continued to live with his mother at various addresses in Chesterfield till about 1910, when he went to Waleswood, near Worksop, in the administrative county of Nottingham, for a period of about six months.

The poor person returned to his mother, who was then residing at 18 Foljambe Road, Chesterfield, where he remained until June, 1911. In that month he, with his mother, removed to the county borough of Sheffield and lived at various addresses in Sheffield. Subject to the matter set out hereafter he resided in the county borough of Sheffield without interruption from June, 1911, until August 5, 1914.

On November 8, 1912, the poor person enlisted as a man of the Territorial Force in the Royal Field Artillery. From August 2 to August 16, 1913, he was absent from his place of residence in Sheffield while attending the annual camp of the Territorial Force. During such period he served on the current conditions of service in the Territorial Force, which were similar in terms to the present conditions of service in the Territorial Army. On August 5, 1914, on the outbreak of the war, he was embodied with the Territorial Force and thereafter was engaged in military service until disembodied on demobilization on February 25, 1919. Shortly after demobilization he went to Australia, and returned to England in 1930. Since returning to England he had had no fixed place of abode and had from time to time been in receipt of poor relief.

The poor person became chargeable to the Middlesex County Council at their institution at Hillingdon, Uxbridge, on June 29, 1932, was discharged therefrom on May 22, 1933, and readmitted on October 7, 1933, and on May 11, 1934, the above order of removal was obtained by the Middlesex County Council.

Notice of appeal to the Middlesex Quarter Sessions in accordance with s. 97 of the Poor Law Act, 1930, was given to the Middlesex County Council on behalf of the Derbyshire County Council on June 14, 1934, and a statement of the grounds of appeal was forwarded by the Derbyshire County Council to the Middlesex County Council on June 19, 1934. In the statement it was contended that the poor person was not last legally settled in the administrative county of Derby but was last so settled in the county borough of Sheffield.

A. M. Trustram Eve K.C. and *R. P. Hills* for the Derbyshire County Council. The order of the justices directing the removal of the poor person to the county of Derby was wrong. The poor person had acquired a legal settlement by residence for a term of three years, within the meaning of s. 86, sub-s. 1, of the Poor Law Act, 1930, in the county borough of Sheffield, which was later than his Derby settlement. His last legal settlement was not in the administrative county of Derby but was in the county borough of Sheffield. Sect. 86, sub-s. 1, of the Poor Law Act, 1930, follows and is in substantially the

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same terms as s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61). The main issue in this case depends on the answer to be given to the question whether a period of fourteen days during which the poor person was attending an annual training camp of the Territorial Force, as a member of that force, was a period during which he was serving in the military service of the Crown as a soldier within the meaning of s. 93, sub-s. 1 (*a*), of the Poor Law Act, 1930, and its predecessor, s. 1 of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), which deal with the question of the irremovability of poor persons.

For the purpose of irremovability, a gap in the continuity of residence in a given place may be bridged and if, excluding any period excepted by the proviso to s. 93, sub-s. 1, of the Act of 1930, or, formerly, the proviso to s. 1 of the Act of 1846, the total of the two periods, before and after the gap, amounts to twelve months a status of irremovability is established. But in the case of settlement, the residence must be continuous for three consecutive years, without any gap created by the proviso, before a settlement by residence can be acquired within the meaning of s. 86, sub-s. 1, of the Poor Law Act, 1930 (formerly, s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876). Any period which falls to be subtracted under the proviso to s. 93, sub-s. 1, in computing the period required to establish irremovability, will disqualify the year in which it occurs from being one of the three years' residence required for a settlement under s. 86, sub-s. 1, and the computation of the period of residence must start afresh after the gap or break.

The question whether absence from a place of residence in the military service of the Crown as a soldier constitutes a break in the period of residence necessary to acquire a settlement is concluded, so far as this Court is concerned, by the decision in *Newark Union* v. *Maidstone Union* (1), where it was held that the absence of the poor person on military service constituted a break in the period of residence necessary to acquire a settlement under s. 34 of the Act of 1876. See

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(1) (1905) 93 L. T. 602.

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also *St. Olave's Union* v. *Canterbury Union* (1), where the poor person was a patient in a hospital. These decisions bind this Court on the question of a break in the period of residence, and if the Court holds that the poor person in this case, while absent from his place of residence in Sheffield, attending the annual training camp of the Territorial Force from August 2 to August 16, 1913, was serving in the military service of the Crown as a soldier, then there was a break in his residence in Sheffield which prevented him from acquiring a legal settlement there.

But it is submitted that this man was not serving in the military service of the Crown as a soldier while attending camp. The phrase "serving in the . . . . military service of the Crown as a . . . . soldier," must be construed as a whole. It implies some distinct employment in the service of the Crown in a particular service. The words denote a distinct and a reasonably permanent personal status and do not refer to casual and temporary activity. The proviso contemplates service in the regular forces of the Crown as distinct from service in any of the auxiliary forces, such as the Territorial Force, or the old Militia. Although a member of the Territorial Force is at all times, while he remains a member of that force, a contingent, or potential, or inchoate, or embryonic soldier, serving in the military service of the Crown, it is not correct to say that he is at all times so serving. During some part of the term for which a man joins the Territorial Force, he is not a soldier serving in the military service of the Crown. He is not actually a soldier except during certain limited periods, such as when the men of the Territorial Force are embodied or are called out on actual military service. Attendance at the annual training camp of the Territorial Force is not such actual military service, and the poor person in this case was not a soldier so serving within the meaning of proviso (*a*) to sub-s. 1 of s. 93 of the Act of 1930. There was, therefore, no break in the continuity of his period of residence in Sheffield so as to prevent him from having acquired a legal settlement in the county borough of Sheffield later than his Derbyshire settlement.

(1) [1897] 1 Q. B. 682.

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Cartwright Sharp K.C. and *Eric Blain* for the Middlesex County Council. The order of the justices was right. The county of Derby was the place of the last legal settlement of the poor person in this case, because his absence from his place of residence at Sheffield in August, 1913, while attending the annual training camp of the Territorial Force constituted a break in his period of residence in Sheffield and prevented him from acquiring a legal settlement there within the meaning of s. 86, sub-s. 1, of the Act of 1930, or s. 34 of the Act of 1876. While attending the training camp he was serving in the military service of the Crown as a soldier within the meaning of proviso (*a*) to sub-s. 1 of s. 93 of the Act of 1930.

His position as a member of the Territorial Force attending the training camp is regulated by a variety of statutes and regulations, all of which support the view that he was serving in the military service of the Crown as a soldier. Sect. 10, sub-s. 1, of the Territorial and Reserve Forces Act, 1907, incorporates s. 80 of the Army Act, 1881, which deals with the mode of enlistment. Sect. 28, sub-s. 1, of the Act of 1907 provides that the Army Act shall apply to the Territorial Force and officers and men thereof in like manner as it applies to the Militia and officers and men of the Militia, except that men of the Territorial Force shall, in addition, be subject to military law when called out on actual military service. Under s. 176, sub-ss. 5 and 6, of the Army Act, 1881, the persons subject to military law as soldiers included all non-commissioned officers and men of the Army reserve force, the Militia reserve force and the Militia during training. The position of the Territorial Force is similar to that of the old Militia in that respect. See also s. 178 of the same Act, which deals with the mutual relations of regular and auxiliary forces. Sect. 190, sub-s. 6, of the Army Act, 1881, defines a "soldier" as including every person subject to military law during the time that he is so subject.

In *Horton Overseers* v. *Leeds Overseers* (1), it was held that the proviso in the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1 (which corresponds to proviso (*a*) to sub-s. 1 of s. 93 of the

(1) (1855) 5 E. & B. 595.

Poor Law Act, 1930), that the time during which any person shall be serving Her Majesty as a soldier, marine or sailor shall be excluded from the computation of the time a residence for which creates irremovability, applies to the time during which a person is serving as a Militia man. In that case Lord Campbell C.J. said (1): "I cannot entertain any doubt that a man serving Her Majesty in the Militia is serving her as a soldier, within the meaning of the exception in statute 9 & 10 Vict. c. 66, s. 1. The time of such service is therefore excluded from the computation of the time which is to confer the status of irremoveability."

LORD HEWART C.J. This is a case stated under the provisions of the Quarter Sessions Act, 1849, and the question, and the only question, to which it gives rise depends on the words in s. 93, sub-s. 1, of the Poor Law Act, 1930.

Notice of appeal was given to the Middlesex Quarter Sessions by the Derbyshire County Council, who are here the appellants, against an order of removal to the area of the county of Derby of a poor person named A. P. Booth, and the question was whether the county of Derby was the last place of legal settlement of that poor person. It was common ground that that question was to be regarded as dependent upon the further question whether a certain period of fourteen days, during which the poor person was attending the annual training camp of the Territorial Force as a member of that force, was a period during which he was serving in the military service of the Crown as a soldier, so that the period constituted a break in the residence of the poor person and so prevented him from having resided for a continuous term of three years in a county borough within the meaning of s. 86, sub-s. 1, of the Poor Law Act, 1930.

It was agreed, and it necessarily followed, that if that period did constitute such a break, the county of Derby was the last place of legal settlement of the poor person; otherwise, it was not.

The important words are to be found in s. 93, sub-s. 1, of the Poor Law Act, 1930, which provides as follows: "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order: Provided that any time during which he has been," and then follows a series of exceptions. The first, and the only one which is relevant to the present inquiry is: "Provided that any time during which he has been—(*a*) serving in the naval, military or air service of the Crown as a seaman, marine, soldier or airman . . . . shall not be regarded as interrupting his residence in the county or county borough, but shall for all purposes be excluded in the computation of time hereinbefore mentioned."

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(1) 5 E. & B. 598.

In the course of the argument in this Court, where our attention has been directed to many statutes and some cases, it appeared to me that some questions were raised which are not really relevant. We are not, I think, to consider whether a member of the Territorial Force is to be regarded as a soldier. The question is a much more limited one—namely, whether during the particular fortnight when this member of the Territorial Force was in camp by way of fulfilling part of his annual training he was serving in the military service of the Crown as a soldier.

It is not denied that during some part at any rate of the period of four years for which a man joins the Territorial Army, as it is now called, he is not a soldier serving in the military service of the Crown. What exactly that period is remains in controversy and it is not material for the present purpose, but, speaking for myself, I am much attracted by the distinction which was drawn by Mr. Trustram Eve in his argument for the appellant, where he contended that, although during the whole of the four years the member of the Territorial Force was potentially a soldier, he was not actually a soldier except during certain, perhaps limited, periods. Just as a piece of marble is potentially a work of sculpture, it does not become a work of sculpture until something happens to it.

The Territorial and Reserve Forces Act, 1907, followed upon the Volunteer Act, 1863, and that Act very carefully distinguishes what it calls "actual military service" from "service" simpliciter. The word "service" occurs in this statute many times; sometimes we have the word "service" by itself, sometimes we have "permanent service," sometimes "general service," and sometimes "actual military service." The argument of Mr. Trustram Eve, as I understood it, was that although a member of the Territorial Force is at all times while he remains a member a contingent, or potential, or inchoate, or embryonic soldier, serving in the military service, it is not true to say that he is at all times so serving. In my opinion, that contention is right, and when one looks at the Act of 1907 it is apparent that the Legislature, having regard to the civilian origin and nature of this auxiliary force, is very careful in the terminology which it employs. For example, by s. 10, sub-s. 1, it is provided among other things that certain sections of the Army Act, 1881, shall apply to the Territorial Force, and those sections are re-enacted, but with the substitution of certain terms, and one of the terms substituted is that a "man of the Territorial Force" takes the place of the term "soldier."

There is no doubt that this man, the poor person with whom we are concerned, was at all material times a man of the Territorial Force, but it by no means follows that when he was in camp for a fortnight he was in the service of the Crown as a soldier. The main part of Mr. Cartwright Sharp's argument, if I may say so with all respect, seemed to me to exemplify the ancient enemy, the fallacy of the undistributed middle. The argument appeared to be that a person serving in the service of the Crown as a soldier is subject to military law. That is perfectly true, but it does not follow that a person who is subject to military law is a person serving in the military service of the Crown as a soldier. Indeed, when one looks at the enumeration of various persons who are subject to military law, it is quite obvious that the expression "soldier serving in the military service of the Crown" cannot be applied to all of them. There are a great number of them to whom obviously it cannot be applied.

I have come to the conclusion, therefore, that the test is not whether the term "soldier" is in some sense at any time applicable to a man in the Territorial Force. The test is whether it is true to say that a member of the Territorial Force in camp for fourteen days, and therefore subject to military law, is, during that period, serving in the military service of the Crown as a soldier. I think he is not. I think the true conclusion is that he is serving in the military service of the Crown as a soldier only during those periods which can properly be described as periods of actual military service.

The argument has, I think, illustrated the mischief which arises where terms from other statutes enacted alio intuitu are brought into the interpretation of some particular statute.

I do not refer to the cases, because it seems to me that they throw no real light upon the particular problem with which we have to do.

In these circumstances I think the proper conclusion is that this period of fourteen days did not constitute a break, and therefore that the appellants are entitled to succeed.

HUMPHREYS J. I have arrived at the same conclusion, though with considerable hesitation.

The question which we are invited to answer is whether the poor person, who at the material time was a man of the Territorial Force, was, when attending an annual training camp of the Territorial Force as a member of that Force, a person who could be properly described as serving in the military service of the Crown as a soldier. If he was, he comes within proviso (*a*), s. 93, sub-s. 1, of the Poor Law Act, 1930. That is the statute which applies to such a matter to-day, though it is to be remembered that the language of that section was not new in 1930, but, we are told, was taken substantially from previous statutes going back, I think, to 1846. Some matters have obviously been added, because some matters are referred to in 1930 which did not exist in 1846. What that section provides, is, by way of stating the general law, that: "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order" of removal. That is the general law, but it was apparent, and recognized by the Legislature, that there was a number of cases in which a man would be likely to, or might, interrupt his residence in the county or county borough for some reason—it might be voluntarily or involuntarily—other than the reason which ordinarily actuates a man who interrupts his residence for any substantial time in a particular place—that is, his desire to go somewhere else, to leave for a time or permanently. So we find a list of descriptions of situations in which a person may find himself who, either by his own desire or, it may be, against his own will, has interrupted his residence in the place in which otherwise he was residing. One instance given in the section is that of a prisoner in a prison; another is that of a patient in a hospital, who, no doubt, is there by his own consent but who has probably not chosen that particular hospital himself—he may well have been taken there because of his illness or accident. A person may be confined in an institution for lunatics, or detained in one of various other institutions. There is the further case of a person who is in receipt of poor relief. Then the Legislature had to deal with that numerous class of persons who were by reason of their service to the Crown ordered to live for a time, longer or shorter, in some other place than that in which, if they happened to be married, their wife and children, if any, were living. So we find that among the other persons are those who are described as "serving in the naval, military or air service of the Crown as a seaman, marine, soldier or airman." I myself do not suppose that Parliament had in mind in the least when using that language the distinction which existed between the regular soldier, the militiaman, the yeoman and the volunteer, and it certainly did not have in mind the position of a member of the Territorial Force, which did not exist. The Territorial Force may, I think, be said with reasonable accuracy to be the descendants of the old Volunteers. So we have to say whether a member of the Territorial Force comes within the relevant words when he is attending his annual camp.

By the Army Act, 1881, it is provided in s. 190 that the expression " soldier " is to include every person subject to military law during the time that he is so subject. By s. 176 of the same Act it is provided that persons other than officers—that is, non-commissioned officers and men—belonging to various forces which now include the Territorial Army, formerly known as the Territorial Force, are subject to military law as soldiers when called out for training and exercise. Those two sections seem to me to make it beyond question that this man when attending, as he was, a training camp, was a person who was subject to military law, and therefore was a soldier within the meaning of the Army Act. But s. 93 of the Poor Law Act, 1930, to which we must always return, does not deal with the case of a soldier. It would have been quite simple to say that the proviso should apply to any person who is a soldier, a seaman, a marine or an airman, but it does not say so. I respectfully agree with the view taken by my Lord that the words which are used in that section are a clear indication that there may be a distinction between a person who is a soldier for some purpose and yet may not be a soldier who is serving in the military service of the Crown as a soldier.

What is the position of a man of the Territorial Force? In my opinion, it makes no difference whether you call him a " man of the Territorial Force " or " a man of the Territorial Army " or " a soldier of the Territorial Army." The position remains the same. Now that the Territorial Force is the Territorial Army, " soldier " seems to be a proper and reasonable description to apply to him. But his position is quite different from that of the man who enlists in the Regular Forces. He retains all his civilian rights, and his position as a civilian is definitely different from that of the man who becomes a regular soldier. It is quite true that during his annual training in camp, and very likely during other occasions when he is attending instruction, performing exercises, he is, for the purpose of discipline and so forth, a soldier, and liable to military law. But that does not prevent his remaining a civilian, with civilian rights. His position, I think, is that during that time he is temporarily a soldier, but he is a soldier who is, if a distinction is to be drawn, being trained, as distinct from a soldier who is actually serving.

When one looks at the Territorial and Reserve Forces Act, 1907, which applies to this particular individual, one finds a definite distinction drawn between a man who is being trained and a man who is on actual military service. I am referring to s. 2, sub-s. 2 (*a*), of that Act, which draws a distinction. It is dealing with the powers and duties assigned to the Army Council with regard to the Territorial Force, and it provides that certain things shall happen when the units of the Territorial Force or any of them are called out for training or actual military service, or when the force is embodied. In my view—and in this I respectfully agree with the judgment of Lord Hewart C.J.—s. 93 of the Poor Law Act, 1930, is dealing with the case of a man who is called out on actual military service, and a regular soldier is always on actual military service—a man of the Regular Army. The other expression is when the Territorial Force—and it applies particularly to them—is embodied. The rule with regard to the Territorial Army and its embodiment is to be found in a document—Army Order for March, 1934—which provides as follows: "The Territorial Army can be embodied only when the Army Reserve has been called out by Royal Proclamation in case of imminent national danger or great emergency." Therefore it is quite clear that in the ordinary case—and we are now dealing with 1913—when a man of the Territorial Force is attending his annual training he is not attending in any Force which is embodied. Although I feel the difficulty of saying that a man who is a soldier and is attending his annual camp as a soldier and during that training is for all purposes a soldier within the meaning of the Army Act, 1881, yet is not serving in the military forces of the Crown as a soldier, there is, I think, a distinction which can properly be drawn between the case of such a person and the case which Parliament contemplated in passing

s. 93, sub-s. 1, proviso (*a*), of the Poor Law Act, 1930, one of the case of a man who is on actual military service.

For those reasons I agree with the judgment of my Lord, and I would only add this: The case of *Horton Overseers* v. *Leeds Overseers* (1), which was referred to, troubled me a little, but only until I had an opportunity of examining with some care the facts stated in the report. It is stated that (1) he "stayed with them" [i.e., his family] "there till May, 1854; about which time the regiment was embodied"—he was a Militiaman—when he "was again called out to be trained with his regiment, and went to Doncaster, and stayed there with it a month," and so forth, and he then went from that place to Berwick-on-Tweed. Therefore it seems to have been a part of the facts in that case that the man was there with his regiment when his regiment was embodied, as it may well have been in the year 1854. I think that case is only a decision to this effect, that a man of the Militia may be just as much a soldier as a man of the regular forces; and that it is not a decision to the effect that a man who is a member of such a force and is at his annual training comes within the terms of what is now s. 93 of the Poor Law Act, 1930.

SINGLETON J. I agree. The period during which the poor person attended camp for training was from August 2, 1913, to August 16, 1913. It seems to me, for the purposes of s. 93, sub-s. 1, of the Poor Law Act, 1930, that he ought during that time, to use the words of the Territorial and Reserve Forces Act, 1907, to be regarded as "a man of the Territorial Force called out for training," and not as serving in the military service of the Crown as a soldier. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Kingsford, Dorman & Co., for H. Wilfrid Skinner, Derby.*

Solicitor for the respondents: *C. W. Radcliffe.*

T. W. M.

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(1) (1855) 25 L. J. (M. C.) 38.

THE KING *v.* KENT JUSTICES.

1935
Nov. 4, 5.

Ex parte COMMISSIONER OF METROPOLITAN POLICE.

SAME *v.* SAME.

Ex parte SAME.

Justices—Appeal from petty sessions to quarter sessions—Appeal against sentence only—Jurisdiction of quarter sessions to quash conviction—Private prosecutor not appearing as respondent—Right of commissioner of police to appear as respondent—Right of justices to be represented—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 25.

A defendant, convicted and sentenced at petty sessions for an offence to which he had pleaded guilty, appealed to quarter sessions against his sentence only. At the hearing of the appeal neither the prosecutor nor any one else opposed the appeal as respondent or otherwise, and the court of quarter sessions, without hearing a witness who was present to speak to the circumstances of the conviction, made an order not only allowing the appeal and striking out the sentence but quashing the conviction also:—

Held, that the order quashing the conviction was made without jurisdiction and should itself be quashed.

Reg. v. *Surrey Justices* [1892] 2 Q. B. 719, explained and held inapplicable.

Whether on an appeal by a defendant from petty sessions to quarter sessions, which the prosecutor does not oppose as respondent, the commissioner of police is entitled to appear and take part in the proceedings as a respondent or otherwise, *quaere*.

Reg. v. *Truelove* (1880) 5 Q. B. D. 336, 340 considered.

On an appeal from petty sessions to quarter sessions the justices of the court of petty sessions are entitled as of right to appear before the court of quarter sessions to support their decision and to give that court their assistance, and by so doing they do not make themselves a party to the appeal or liable for costs.

Where an appeal by a defendant from petty sessions to quarter sessions is not to be opposed by the prosecutor as respondent, it is the duty of the clerk to the court of petty sessions, with a view to affording assistance to the court of quarter sessions, to inform the justices of petty sessions of the matter, so that if they so desire they may themselves appear at the hearing of the appeal, or may request the Director of Public Prosecutions to do so or may arrange for some public authority to act on their behalf: per Humphreys J.

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THE KING
v.
KENT
JUSTICES.
COMMISSIONER
OF
METROPOLITAN
POLICE,
Ex parte.

ORDERS NISI for certiorari and mandamus.

On March 23, 1935, W. S. W. Fone was charged at Bromley, Kent, with stealing on that date from "The New Inn" public-house, Hayes, Kent, a lavatory seat belonging to the proprietors of the house, contrary to s. 2 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and with receiving the said article well knowing it to have been stolen contrary to s. 33 thereof, the charge sheet being signed by F. Clarke, the manager of the house.

On March 25, 1935, the defendant, who was represented by a solicitor, appeared before the Bromley petty sessions, where he elected to be dealt with summarily and pleaded guilty to the offence of stealing. The only witness was Detective-sergeant Kennelly of the metropolitan police, who had arrested the defendant and was in charge of the case, who stated the facts to the court and supplied it with the result of his inquiries as to the circumstances and previous character of the defendant. The court after hearing the facts and a plea in mitigation of punishment convicted the defendant, sentenced him to pay a fine of 2*l.*, and ordered him to pay 5*s.* damages.

On April 5, 1935, the defendant gave notice of appeal to the West Kent quarter sessions against his sentence only, on the ground that it was too severe, and the notice was served upon F. Clarke and upon the Bromley justices.

On May 22, 1935, the appeal was heard by the court of quarter sessions. The defendant appeared by counsel, but F. Clarke did not appear as respondent to oppose the appeal, and the Bromley justices were not represented. The commissioner of metropolitan police appeared by counsel and claimed to be entitled to assume the position of respondent and to oppose the appeal. The detective-sergeant in charge of the case was in attendance to the knowledge of the court and was prepared to furnish it with the result of his investigations. An objection was taken on behalf of the defendant to the appearance of the commissioner on the grounds that he was not a party to the appeal, inasmuch as neither he nor any police officer was prosecutor before the petty sessions, and that he had no authority to appear in place or on behalf of either F. Clarke or the Bromley justices. The court of quarter sessions decided that the commissioner was not entitled to be heard; and as to the merits the court, without hearing the evidence of the detective-sergeant, and in the absence of the respondent or any counsel on his behalf to support the conviction, allowed the appeal and struck out the sentence, and relying upon the decision in *Reg.* v. *Surrey Justices* (1), quashed the conviction also.

On July 1, 1935, the commissioner of metropolitan police made an application to the High Court for and obtained an order nisi for a certiorari to remove into the High Court the order of the court of quarter sessions quashing the conviction on the ground that the latter court had acted in excess of its jurisdiction; and also an order nisi for a mandamus to quarter sessions to hear and determine according to law the matter of the defendant's appeal on the same ground.

When the application was made to the High Court for the orders nisi, affidavits by Detective-sergeant Kennelly and by R. W. H. Fanner, the clerk of the Bromley justices, were read, which stated, substantially as above set out, the facts down to the giving of the notice of appeal to quarter sessions. Mr. Fanner further stated in his affidavit that the Bromley justices had not considered it to be his duty to support their decisions upon appeals by persons feeling aggrieved thereby, and that he had requested Detective-sergeant Kennelly to arrange with the police authorities to appear and support the sentence of the justices on the hearing of the appeal.

When the orders nisi came before the High Court for argument, an affidavit by H. Vivian Phillipps, the chairman of the West Kent appeal committee, was read which described the proceedings at the hearing of the appeal by the court of quarter sessions, and the substance of that affidavit is set forth below in the earlier part of the judgment of Lord Hewart C.J.

A further affidavit by Mr. Fanner was then also read in

(1) [1892] 2 Q. B. 719.

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which he stated that, in accordance with the usual practice of the metropolitan police authorities, he requested Sergeant Kennelly to arrange for them to appear as respondents to the appeal, and that he did not, nor had he authority to, request the police authorities to act on behalf of the Bromley justices in the appeal.

Vernon Gattie and *B. H. Waddy* for the justices of the court of quarter sessions, showed cause:

The order of the court of quarter sessions allowing the appeal of the defendant against his sentence was not rendered invalid by reason of the fact that in addition to striking out his sentence it also quashed his conviction. The case of *Reg.* v. *Surrey Justices* (1) is an authority, and the quarter sessions rightly regarded it as such, for the proposition that, where a defendant appeals from petty sessions to quarter sessions against his sentence, the court of quarter sessions has jurisdiction to quash his conviction. At the time when that case was decided a defendant who had been convicted and sentenced at petty sessions had no right to appeal against his sentence only; but he had a right to appeal against both his conviction and sentence, and to limit his grounds of appeal to the sentence. In that case the defendant appealed against both conviction and sentence on the sole ground that his sentence was excessive. In the course of his judgment in the case, Cave J. explained the reason for the decision. He pointed out that in an appeal from petty sessions to quarter sessions the evidence which was before the court below is not before the quarter sessions. The respondent must begin and must prove that the sentence imposed was a proper sentence. Where the appeal is on the ground that the sentence is excessive, and the respondent does not appear and no evidence is brought, the court of quarter sessions cannot tell what sentence, or even whether any sentence, ought to be inflicted, and in these circumstances all that it can do is to strike out the sentence passed by the court below. But where it does not appear that there should be any

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sentence it seems to follow that there cannot properly be any conviction, and that the court is justified in quashing the conviction. That case is strictly analogous to the present case. In each case the only ground of appeal was that the sentence was excessive, and in neither case did the respondent appear, nor was any evidence heard by the court to show what the sentence should be, or indeed that there should be any sentence. In this case therefore, as in that, the court of quarter sessions had jurisdiction not only to strike out the sentence, but also to quash the conviction. It is true that in this case the defendant could not have appealed against his conviction, as he had pleaded guilty; but his inability to do so did not oust the jurisdiction of the court to quash his conviction when there was no evidence to show that any sentence could be passed upon him. The court of quarter sessions might perhaps have taken some other course, such for example as that of dealing with the case under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), or that of remitting the case to petty sessions under the Summary Jurisdiction (Appeals) Act, 1933 (23 & 24 Geo. 5, c. 38), s. 31 (vii.); but it did not do wrong in making the order now in question. The court of quarter sessions rightly decided that the commissioner of metropolitan police was not entitled to take any part in the proceedings before it. He had no right to oppose the appeal as respondent, since neither he nor any police officer had been prosecutor before the court of petty sessions, and he had no authority to appear on behalf or in place of the prosecutor. Neither was the commissioner entitled to represent the Bromley justices. There is evidence to show that these justices never made any request to him to act on their behalf, and in the absence of any such request he had no authority to do so. It is unnecessary, however, to insist on this point, as the commissioner abandoned his claim to represent these justices. If the Bromley justices desired that their interests or those of the prosecutor should be represented at the hearing of the appeal, it was open to them to request the Director of Public Prosecutions to take up the case.

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G. B. McClure and *F. Powell* for the commissioner of metropolitan police, in support of the orders nisi:

The order of the court of quarter sessions quashing the conviction was wrong and should itself be quashed. That order was made without jurisdiction. The defendant did not appeal to the court of quarter sessions against his conviction, but against his sentence only. That court was in error in supposing that the case of *Reg.* v. *Surrey Justices* (1) was an authority for the making of an order quashing the conviction. That case is distinguishable from the present case, for there the defendant appealed against his conviction, while here the defendant did not appeal against his conviction. In that case the Divisional Court rightly applied the ruling of Cockburn C.J. in the previous case of *Reg.* v. *Purdey* (2) to the effect that, where a defendant appeals to quarter sessions against his conviction and no one appears as respondent, it is the duty of the quarter sessions to give effect to the appeal on a presumption that the non-appearance of the respondent implies that he is not prepared to maintain the conviction. But, further, in addition to want of jurisdiction, there were in the present case certain special reasons why the court of quarter sessions should not have quashed the conviction. One of these reasons is that the defendant had pleaded guilty to the offence with which he was charged. Another reason is that though there was nobody before the court of quarter sessions to support the conviction, where, as in this case, the original prosecutor or complainant in the court of first instance drops out by death or otherwise, there is no reason why, on an appeal by the defendant, some other person should not take up the prosecution and oppose the appeal as respondent: per Lush J. in *Reg.* v. *Truelove*. (3) The Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 9, sub-s. 1, provides that in that Act "prosecutor" includes any person who appears to the court to be a person at whose instance the prosecution has been instituted, or under whose conduct the prosecution is at any time carried on; and that

(1) [1892] 2 Q. B. 719.

(2) (1864) 5 B. & S. 909, 912; 34 L.J. (M. C.) 4, 6.

(3) (1880) 5 Q. B. D. 336, 340.

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definition seems suitable for general application. Where the private prosecutor has abstained from opposing an appeal by the defendant, it has been a recognized practice that either the commissioner of police or the Director of Public Prosecutions should take over the case on behalf of the prosecutor and act as respondent to the appeal. Evidence can easily be obtained to show that the commissioner of police has frequently so acted. As to the Director of Public Prosecutions, the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), by ss. 2 and 7, empowers that officer to carry on any criminal proceedings, and provides for his taking action in case of the refusal or failure of a person to proceed with the prosecution; and the Criminal Appeal Act, 1907, s. 12, provides that the Director shall appear for the Crown on an appeal to the Court of Criminal Appeal, the Criminal Appeal Rules, 1908, r. 2 (*a*), further indicating that when he so appears he shall be a "respondent" to the appeal. In the present case, if the court of quarter sessions had not refused permission, there would have been a party before it to oppose the appeal and support the conviction. The commissioner of metropolitan police, acting under the authority of the Home Secretary, instructed counsel to attend for these purposes at the hearing of the appeal. In these circumstances it was open to that court to adopt one or other of several courses. It might have heard the counsel so instructed as representing the commissioner himself as an independent respondent; or it might have heard him as representing F. Clarke, the original prosecutor; or it might have heard him as representing the Bromley justices in support of their decision; or it might have heard him as a member of the bar and amicus curiæ stating his view as to what should be done in the circumstances. Even if the court was unable to decide which of these courses should be taken, it could at least have respited the hearing of the appeal until the next appeal day. A further reason why the court ought not to have quashed the conviction is that it had not heard the evidence of the detective-sergeant, who had been in charge of the case from the beginning, and was to its knowledge then present, as to the circumstances and character of the defendant and the proceedings in the court below.

LORD HEWART C.J. These are two orders nisi, the one for a writ of certiorari and the other for a writ of mandamus, and it will be convenient to deal first with the case of the writ of certiorari. An order nisi was granted calling upon justices of the county of Kent, of whom a court of quarter sessions had been constituted, to show cause why a writ of certiorari should not issue to remove into this Court a certain order allowing the appeal of W. S. W. Fone, the defendant, against his conviction by the court of summary jurisdiction for the Bromley petty sessional division whereby he was convicted of stealing from a public-house in Hayes an article of the value of 5*s.* The justices in quarter sessions in the circumstances which arose quashed the conviction, and what is desired is that the order by which they did so should be removed into this Court and quashed.

The facts of the case are very simple. As appears from the affidavit of Mr. Fanner, who is clerk to the Bromley justices, on March 25 last the defendant appeared before these justices in petty sessions upon a charge that he stole this article, and in the alternative that he received it well knowing it to have been stolen. The defendant elected to be dealt with summarily and pleaded guilty to the charge of stealing. The justices after hearing the facts and a plea in mitigation of punishment imposed a fine of 2*l.* and ordered the defendant to pay a further sum of 5*s.* for damage. Against that sentence the defendant gave notice of appeal, and the only ground stated therein was that his sentence was too severe. The facts therefore were that there had been a plea of guilty, that against the conviction there was not, as indeed there could not have been, an appeal, and that there was an appeal only against sentence. The appeal then came before the justices of the West Kent appeal committee in quarter sessions, and the chairman states very clearly in his affidavit what happened. When the appeal was called on counsel on one side informed the court that he appeared on behalf of the defendant, and counsel on the other side informed the court that he appeared on behalf of the commissioner of metropolitan police and claimed the right to oppose the appeal on behalf of the commissioner as respondent to the appeal. Counsel for the defendant then objected that the opposing counsel could not be heard, inasmuch as the commissioner was not a party to the appeal, neither the commissioner nor any police officer having been prosecutor in the Bromley police court. The opposing counsel then urged that he was entitled to be heard on behalf of the Bromley justices, but it is common ground that after some argument he abandoned his claim to represent the justices, who indeed were not parties to the proceedings, though they nevertheless had the right to appear if they chose to do so. He still contended, however, that the commissioner of metropolitan police was entitled to be heard and to conduct the appeal as respondent. Argument followed upon that contention, and in the result the justices in quarter sessions came to the conclusion that the commissioner was not entitled to be heard or to take any part in the appeal. But they by no means stopped there. Instead of calling upon Mr. Kennelly, the chief witness, who as we know was there present, to depose to the facts, or, if they thought fit, and as they were invited to do, respiting the appeal to a later date, they decided to deal with the matter forthwith, and in the absence of any counsel for the respondent. Having had their attention directed to the well known case of *Reg.* v. *Surrey Justices* (1) they accepted the contention which was urged on the defendant's behalf, and not only allowed his appeal and struck out the sentence which was being appealed against but also quashed the conviction.

It is quite clear that, in taking that course these justices in quarter sessions believed that they were acting upon the authority of the decision in *Reg.* v. *Surrey Justices* (1). But it is no less clear, when the circumstances and the date of that case are looked at, that they could find there no warrant for the course which they took. In that case, which was

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decided in 1892, that is to say forty-three years ago, there was an appeal against sentence in the sense that there was an appeal against a summary conviction upon the ground, and the sole ground, that the punishment inflicted was excessive. But in that case there had been no plea of guilty and the appellant was appealing against his conviction. Much has happened since that case was decided. The Criminal Justice Act, 1925, s. 25, has provided: "A person who after pleading guilty or admitting the truth of the information is convicted of any offence by a court of summary jurisdiction shall have a right to appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions against his sentence." A right is there given to the defendant to appeal against his sentence even though in the first court he has pleaded guilty. Previously the Criminal Justice Administration Act, 1914, s. 37, had provided: "Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead guilty or admit the truth of the information, may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions." In my opinion, since the passing of the Criminal Justice Act, 1925, giving a right of appeal against sentence notwithstanding a plea of guilty, the decision in the case of *Reg.* v. *Surrey Justices* (1) throws no light at all upon the duty of the court of quarter sessions in such a case as this. That court was entitled to deal, and to deal only, with the question of sentence, and it exceeded its jurisdiction when, going beyond the appeal which was before it for decision, it proceeded to quash the conviction.

With regard to the other question which has been raised—namely, whether the contention of counsel for the commissioner of metropolitan police that the commissioner was in such circumstances as those of the present case entitled to appear and to take part in the conduct of the appeal, I do not think it is in the least necessary for the determination of the present case to decide that question, and I therefore prefer at this moment to express no final opinion upon it,

(1) [1892] 2 Q. B. 719.

though I recognize that it may hereafter call for very careful consideration. It is quite obvious that the justices of the court of petty sessions might have instructed counsel. It is perhaps true to say that in the circumstances which had occurred these justices did in effect instruct counsel by inviting the police to take the matter up in the way in which we are now informed they did by two affidavits, and, if all the facts had then been known, it might conceivably have been argued that the learned counsel who said he was appearing for the commissioner of police would have been in a position to say that he was really appearing for these justices. He took no such course, but on the contrary he abandoned the contention that he was appearing for the justices and said that he claimed to appear only for the commissioner of police. I need not deal further with these points, but I may say that I have no doubt whatever that the justices came to an erroneous conclusion when they decided that in the circumstances no course was open to them except to proceed to deal with the appeal in the absence of evidence and of any respondent. They might have obtained evidence themselves, or they might have adjourned the appeal as they were asked to do. But, again, even if they had been right in proceeding, in the absence of evidence and of a respondent, to hear the appeal against sentence, they had clearly no jurisdiction to quash the conviction.

I think, therefore, that this order nisi for a writ of certiorari for the purpose of quashing that order of the court of quarter sessions should be made absolute.

Moreover, as it clearly appears that the justices of the court of quarter sessions never directed their minds to the real and only point which was before them, namely, the quantum of the sentence which had been imposed by the justices in petty sessions, I think that the order nisi for a writ of mandamus to these justices to hear and determine according to law should also be made absolute.

HUMPHREYS J. I am of the same opinion. An order nisi has in this case been directed to justices of the county of

Kent who sat as a court of quarter sessions to show cause why a writ of certiorari should not issue to remove into this Court for the purpose of being quashed a document which is described as " An order dated the 22nd May, 1935, allowing the appeal of Fone against a conviction by the court of summary jurisdiction for the Bromley petty sessional division." The very short ground which is sufficient for the decision of this case is that in truth there was no appeal by Fone against any conviction by a court of summary jurisdiction, and, therefore, an order made by the court of quarter sessions purporting to allow such an appeal must be, and is, wrong, and, I further think, was clearly made in excess of their jurisdiction. Consequently, a writ of certiorari ought to issue to them to remove and quash that order made without jurisdiction.

The appeal in this case was brought by virtue of s. 25 of the Criminal Justice Act, 1925, and without that section and until that year no such appeal could possibly have been brought to any court of quarter sessions. The section runs: " A person who after pleading guilty or admitting the truth of the information is convicted of any offence by a court of summary jurisdiction shall have a right to appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions against his sentence." Those words are so plain and clear that it would have been extremely difficult for any one to argue that upon such an appeal the question of an appeal against the conviction was a matter which quarter sessions had power to consider. Mr. Gattie has based an argument, and the justices in petty sessions relied, upon the case of *Reg.* v. *Surrey Justices* (1), to which my Lord has referred. I think it is only necessary to realize what the law was at the date when that case was decided, which was 1892, and the alteration in the law which was made by the Act of 1925, in order to see that that case is no authority whatever for the proposition that in this case the justices in quarter sessions had any power to deal with the question as they did.

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In 1892 the only general right of appeal against a conviction by a court of summary jurisdiction—I use the word "general" because certain Acts of Parliament gave a specific right of appeal against conviction for certain offences—was under s. 19 of the Summary Jurisdiction Act, 1879, which provides that where any person is adjudged by a court of summary jurisdiction to be imprisoned without the option of a fine and did not plead guilty or admit the truth of the information or complaint he may appeal to a court of general or quarter sessions. It was thus necessary for any person, who came to quarter sessions purporting to have a right of appeal, to show that he had been convicted by a court of summary jurisdiction, that he had not pleaded guilty or admitted the truth of the accusation, and that he had been sentenced to imprisonment; and that was the only right of appeal against a summary conviction. Those circumstances were all present in the case of Bell, the appellant in *Reg.* v. *Surrey Justices.* (1) He had not pleaded guilty, he had been convicted of an offence, and he had been sentenced to fourteen days' imprisonment. He appealed to quarter sessions against his conviction. It was the only thing he could appeal against, but his object in appealing against the conviction, as he made clear in his grounds of appeal, was that he desired to protest against the propriety of his sentence of fourteen days' imprisonment. The respondents did not appear at the hearing of the appeal and the court of quarter sessions quashed the conviction. When the matter came before the Divisional Court that Court held that, although on the appeal to quarter sessions the only matter of controversy to be discussed was the sentence, yet, since the appeal was an appeal against the conviction, it was for the respondent to begin and to prove de novo the commission of the offence, and that, as the respondent was not there to prove the offence, the quarter sessions had rightly quashed the conviction. In my view the Divisional Court in so holding was only adopting the ratio decidendi of the early case of *Reg.* v. *Purdey.* (2) Some

(1) [1892] 2 Q. B. 719.
(2) 5 B. & S. 909, 912; 34 L. J. (M. C.) 4, 6.

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reliance was placed by Mr. Gattie upon certain words in the judgment of Cave J. in *Reg.* v. *Surrey Justices.* (1) The learned judge is reported to have said speaking of the case then under consideration: "Here the appellant appealed against the judgment, not against the verdict." (1) If that statement is to be taken to mean that the appellant did not appeal against his conviction, but did appeal against his sentence, it is of course obviously wrong. I prefer, however, to assume that the learned judge was not saying anything of the sort, but was merely indicating that the object of the appellant was to get altered not the conviction but the sentence.

The next change in the law, as my Lord has pointed out, was brought about by the Criminal Justice Administration Act, 1914, s. 37, which provides: "Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead guilty or admit the truth of the information, may appeal from the conviction." That section made an amendment, but a very slight amendment, in the previous provisions, the only alteration which it effected being that a person should have the right of appeal to quarter sessions against a conviction, although he had not been sentenced to imprisonment. It left out the proviso that he must have been sentenced to imprisonment. In 1918 that section was under consideration by this Court in the case which is reported as *Harris* v. *Cooke.* (2) The ratio decidendi of that case is of no materiality in the consideration of the present case. It turned upon the right of appeal expressly given by the Regulations made under the Defence of the Realm Acts, of unhappy memory, but in the course of his judgment with reference to a point which had been argued by Sir Archibald Bodkin on behalf of the appellant, Avory J. made this observation: "I will only say that I do not at present think that any person who has really, without any ambiguity, pleaded guilty to an offence covered by that section"—that is the section I have referred to, s. 37—"has any right to appeal either against the finding that he is guilty or against the sentence. I think that the purpose

(1) [1892] 2 Q. B. 719, 722.

(2) (1918) 83 J. P. 72.

of that section, as of s. 19 of the Summary Jurisdiction Act, 1879, was to take away from a person who has in fact pleaded guilty any right of appeal." (1)

It is therefore to my mind clear beyond question that when in the present case the defendant decided to appeal to quarter sessions, he could only appeal under the terms of s. 25 of the Act of 1925 against his sentence, which was to pay a fine of 40s., and that the matter of his conviction, which he did not and could not appeal against, was not before the court.

For these reasons I concur in the judgment of my Lord that the certiorari should go in this case.

An interesting question has been argued by counsel on both sides as to the position of a member of the bar who at quarter sessions claimed to be entitled to appear, as he submitted, for a respondent to the appeal. I agree that this question does not call for, and therefore ought not to receive, a decision in so far as the right of the commissioner of metropolitan police to appear as a respondent in a case where the other party—those are the words of the material Act—to the appeal, that is the party other than the appellant, is not represented. As to that I will only make this observation, that, having looked at the case of *Reg.* v. *Truelove* (2), which was relied upon by Mr. McClure, I do not regard it as any authority in support of the proposition that the commissioner of police has the right to appear. It does not seem to me to touch the matter at all. It is to my mind of the greatest importance, where the private prosecutor has initiated criminal proceedings, and a conviction has been obtained in a court of summary jurisdiction, and there is an appeal, that some person other than the appellant should be present to assist quarter sessions in dealing with the matter. The person who initiated the proceedings would of course normally be a proper respondent, and perhaps the only respondent, to the appeal. I entertain no doubt whatever that the justices themselves have also an absolute right to appear, to instruct counsel, and to call evidence in support of the decision at which they have arrived and which is then

(1) 83 J. P. 73.

(2) 5 Q. B. D. 336, 340.

under consideration by the court hearing the appeal. In so doing they do not make themselves a party to the appeal, and therefore no order can be made against them in respect of costs. They appear, in my view, in precisely the same way as licensing justices, who have refused the renewal of a licence, appear on an appeal to quarter sessions against the refusal, to inform the court of quarter sessions of the reasons upon which they acted, and to give that court their assistance, and their appearing in the proceedings includes the instructing of counsel and the calling of witnesses to sustain their decision. One can well understand that, as a rule, a bench of magistrates, or, for the matter of that, a stipendiary magistrate, would not desire to be represented on such an appeal, when the other party is going to be represented.

Where the other party to the appeal does not appear the court of quarter sessions has not the advantage of his presence, and I should like to express my view that upon information that he is not going to be represented it is the duty of the clerk to the justices to bring the matter to their notice, so that they may endeavour to see that in some other way quarter sessions are afforded the assistance to which I have referred. That assistance may be given in one or other of several ways. One way in which it may be given is by the justices directing their clerk to have counsel instructed on their behalf. Another way in which it may be given, as Mr. Gattie pointed out, would be by the justices requesting the Director of Public Prosecutions to take up the matter. I have no doubt that the Director has statutory power to take the matter up if he chooses to do so. I am not at all sure, however, that he could be called upon to take up such a matter. In the rather terrifying language of the Act under which the Director acts, it is a case in which a person has been convicted of an offence not punishable with death. If it is desired to insist upon his taking up a case, recourse may be had to the Attorney-General, who has power to require the Director to take up any case. If, however, the justices should be reluctant to instruct counsel by means of their clerk or through him assuming him to be a solicitor, or to approach the Director of Public Prosecutions, I think it could be open to no objection in law and would be extremely convenient in practice for them to arrange that some public authority, which might appropriately be the local police authority, should act on their behalf in the way I have indicated. I at one time thought that that was the course intended to be pursued in this case, but it now appears from the affidavit of the clerk to the justices which was handed in this morning that that was not the course intended. In any case that course was not here adopted. I would only add that, where, in future, justices think it right to take such a course, it would, in my opinion, be very desirable that they should put the matter beyond doubt by directing their clerk to apply to the local police authority in writing requesting that authority to act on their behalf, and to represent them at the hearing before the quarter sessions. Whether, in those circumstances, the commissioner of police would have any more right than any other individual to take the matter up and make himself a respondent to the appeal is a question upon which I express no opinion.

SINGLETON J. I agree, and I desire to add only a very few words. When W. S. W. Fone was before the justices of the court of summary jurisdiction at Bromley in March of this year he elected to be dealt with summarily, and pleaded guilty to the offence with which he was charged, and the justices inflicted upon him a fine of 2*l.* and ordered him to pay 5*s.* damages. On April 5, 1935, he served notice of appeal upon Mr. F. Clarke, the prosecutor, and upon the clerk to the Bromley justices, and it is clear from that notice that his appeal was against sentence only, as indeed it could only have been, because he had pleaded guilty to the offence with which he was charged. That appeal was filed by reason of s. 25 of the Criminal Justice Act, 1925. When the case came before the court of quarter sessions, objection was taken by Mr. Waddy on behalf of the appellant to the appearance of Mr. Powell on behalf of the commissioner of metropolitan police, and after a discussion it was decided by the court

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that it could not hear Mr. Powell. Thereupon, as is shown by the affidavit of the chairman of the court of quarter sessions, Mr. Waddy, upon the non-appearance of the prosecutor or of the Bromley justices, cited to the court the case of *Reg.* v. *Surrey Justices* (1), and contended that in the absence of any evidence the appellant was entitled to have his appeal allowed and the sentence appealed against struck out and that the conviction must consequently be quashed; and the court having considered the case cited to it accepted the contention of Mr. Waddy and quashed the conviction. I think that that was wholly wrong for this reason, that there was here no appeal whatever against the conviction and there could have been none. The case of *Reg.* v. *Surrey Justices* (1) was cited again in this court in support of the proposition for which it was used in the court of quarter sessions. In my view it has no bearing whatever upon a case like the present, in which there is no appeal against conviction, but only an appeal against sentence under s. 25 of the Criminal Justice Act, 1925. It is no part of the duty of the appeal committee of quarter sessions to quash a particular conviction where there is no appeal against that conviction. The circumstances of the case cited and those of the present case are quite different, and I think that a consideration of the change in the law which was made by the Act of 1925 would have obviated in this case any such argument as was based upon that case. The justices in quarter sessions in such a case should consider the notice of appeal and the evidence which are put before them. If in this instance they had not sufficient evidence to enable them to deal with the matter of sentence, which was all that was before them, they could have adopted the suggestion which was apparently made to them to adjourn the case until there was representation on the other side satisfactory to them, and then all the facts could have been put before them.

I concur in the judgments which have been delivered.

Orders absolute.

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Solicitors for the quarter sessions: *Sharpe, Pritchard & Co., for W. L. Platts, Maidstone.*

Solicitor for commissioner of metropolitan police: *The Solicitor for the Metropolitan Police.*

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[1934. M. 2542.]

Shipping—Bill of lading—Clause allowing " liberty to tranship "—Validity—Clause providing for " delivery from the ship's tackles "—Practice at port of arrival to discharge into lighters—Practice known to cargo owners—Consistency of practice with clauses in bill of lading—Right of shipowner to discharge into lighters—Indian Carriage of Goods by Sea Act, 1925 (XXVI. *of* 1925), *Schedule—Hague Rules, art. III., r.* 8.

A cargo of rice belonging to the plaintiffs was shipped on a steamship of the defendants' line for carriage to and delivery at a specified port, the bill of lading containing a clause providing that the shipment was made " with liberty to tranship," a clause providing that the cargo was to be delivered " from the ship's tackles," a clause excepting the act of God and perils of the seas, and a clause incorporating the Hague Rules. By arrangement between the defendants and a company a practice existed at the port of delivery according to which the defendants were entitled to use for discharging the cargoes of steamers of their line a wharf belonging to the company, unless the company required it for one of its own vessels, when the defendants' steamer lay in the harbour, the company sending lighters to take discharge of its cargo and ultimately discharging that cargo at the wharf. On the arrival of the steamship at the port of delivery that wharf was not available, and in accordance with the practice the plaintiffs' cargo was discharged into lighters. While the cargo was still in the lighters they were sunk in a hurricane and the cargo was totally lost. The plaintiffs, alleging that the defendants by discharging the cargo into lighters in accordance with the practice had committed a breach of the contract between them to which the loss of the cargo was due, brought an action against the defendants to recover the value of the cargo:—

Held, that the action failed on the following grounds: that the practice being to the knowledge of the plaintiffs, a general

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practice, applicable at the port of delivery to all steamers of the defendants' line, must be taken to be incorporated in the contract, unless it was unreasonable or was excluded by some provision of the bill of lading; that the practice was not unreasonable; that the clause in the bill of lading allowing liberty to "tranship," assuming it to be valid, not only did not by implication exclude the practice, but expressly authorized the discharge of the cargo into lighters; that that clause was not prevented from being valid by art. III., r. 8, of the Hague Rules or otherwise; that the clause in the bill of lading providing for delivery from the ship's tackles did not exclude the practice: *Marzetti* v. *Smith & Son* (1884) 49 L. T. 580 followed on this point; and that, there being no other clause in the bill of lading which excluded the practice, the defendants, by discharging the cargo into the lighters in accordance with the practice, had not broken and determined the contract, and were therefore protected by the exception clause from liability for the loss of the cargo.

Action tried in the Commercial Court by Branson J.

By a bill of lading dated June 4, 1933, of which Messrs. Marcelino Gonzalez y Compania S. en C., hereinafter called "the plaintiffs," were the holders, it was provided that 500 bags of Burma white rice belonging to the plaintiffs were shipped in good order and condition by Damjee Lakhamsee & Co., of Rangoon, on board the steamship *Tapti*, one of a line of steamships of which Messrs. James Nourse, Ld., hereinafter called "the defendants," were the owners, the said steamship then lying in the port of Rangoon, and to be delivered at Havana "with liberty to tranship or land and re-ship on board the same or any other vessel or vessels," that liberty not to be construed as restricted by any words in the contract whether written or printed and whether descriptive of the voyage or otherwise, including also liberty to deviate, in like good order and condition "from the ship's tackles (where the ship's responsibility shall cease)," and the exception clause included the act of God and all and every other dangers and accidents of the seas and of navigation of whatever nature or kind.

In the margin of the bill of lading there was a clause providing that the cargo was to be discharged at a wharf to be designated by the ship's agents. Indorsed upon the bill of lading was the following clause: "All the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925, and the Schedule thereto are to apply to the contract contained in this bill of lading . . . . If anything herein contained be inconsistent with the said provisions it shall to the extent of such inconsistency and no further be null and void. . . . ."

For the purposes of the present action an agreed statement of facts was prepared, from which the following facts are in substance taken.

In the course of the voyage the *Tapti* struck a submerged object and sustained damage to her rudder.

On August 23, 1933, the steamer reached Havana, where examination showed the necessity of dry-docking her, and, as there were no facilities for doing so at Havana, the defendants decided to unload the cargoes before sending her to New Orleans for the necessary treatment.

On August 29, 1933, after having discharged the other cargoes into lighters, the defendants shifted the *Tapti* to a berth at the Santa Clara wharf belonging to the United Fruit Company in the port of Havana which had been designated by the ship's agents for discharging the bags of rice.

That wharf was used by the defendants for the purpose of discharging their cargoes, and under the terms of their use of it their vessels were obliged to vacate it whenever the Fruit Company had a vessel of their own to discharge there, the defendants' vessels being moved into the stream, the Fruit Company sending lighters at their own expense to take delivery of the cargo and ultimately discharging it from the lighters on to their said wharf. The plaintiffs were aware that this procedure was frequently adopted by the defendants and the Fruit Company.

On August 31, 1933, as the Fruit Company required the wharf for one of their own vessels, the *Tapti* was removed by the defendants from the wharf to an anchorage in the stream, and as she lay there the 500 bags of rice were discharged by the defendants into lighters.

Except in so far as the bill of lading on its true construction might otherwise provide, the plaintiffs did not authorize or

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assent to the discharge into lighters of the bags of rice, and they were in no sense a party to the arrangement between the defendants and the Fruit Company, except in so far as their knowledge of the practice might affect the question.

On September 1, 1933, the lighters were sunk in a hurricane and the 500 bags of rice were totally lost.

It was agreed that the value of the bags of rice, less duty and landing charges, was 347*l.* 16*s.* 3*d.*

On August 31, 1934, the plaintiffs brought the present action against the defendants, stating in their points of claim that by the bill of lading the defendants undertook to deliver the bags of rice in good order and condition at Havana by discharge at a wharf to be designated by the ship's agents, that in breach of their duty the defendants did not deliver the cargo in accordance with the bill of lading or at all but wrongfully discharged it into barges whereby it was totally lost, and that the plaintiffs claimed as damages the value of the rice.

The defendants in their points of defence stated that they denied that they were in breach of any duty as alleged or at all, that if the cargo was put into barges it was so put prior to discharge at wharf as provided in the bill of landing, and if it was totally lost its loss was caused by a hurricane, and that the defendants would rely on the exceptions in the bill of lading and on the provision therein giving them liberty to tranship.

The plaintiffs in their points of reply alleged that by virtue of the Indian Carriage of Goods by Sea Act, 1925, Schedule, art. III., r. 8, the provisions of the bill of lading relied upon by the defendants were null and void and of no effect.

D. Davies K.C. and *Charles Stevenson* for the plaintiffs. The defendants are liable to the plaintiffs for the loss of the bags of rice. By the contract between the plaintiffs and the defendants contained in the bill of lading the defendants were bound to convey the bags of rice to Havana and to discharge them there at a wharf, the particular wharf to be designated by the ship's agents. Moreover, the clause in the bill of lading providing that the bags of rice are to be delivered in like good order and condition from the ship's tackles involves an obligation by the defendants to take the steamship alongside a wharf and to discharge the bags of rice on to that wharf by her tackles. The bill of lading contains no clause empowering the defendants to discharge the bags of rice into lighters. The steamer's agents designated the Santa Clara wharf at Havana as the wharf at which the bags of rice were to be discharged, and the defendants were therefore bound by the terms of the contract to discharge them at that wharf and nowhere else. It is thus obvious that the defendants by discharging the bags of rice into the lighters committed a breach of the contract. That breach of the contract determined the contract and every part of it including the exception clause, and left the defendants liable during the voyage for loss of or damage to the bags of rice by the act of God and all dangers and accidents of the seas and of navigation. Even if that breach of the contract by the defendants did not determine the contract it occasioned the loss of the goods, and to a loss so occasioned the exemption clause in the bill of lading does not apply.

Willink K.C. and *H. L. Holman* for the defendants. The defendants are not liable for the loss of the bags of rice. They have committed no breach of the contract between the plaintiffs and themselves which renders them liable for that loss. The contract gave the defendants the right to put the bags of rice into lighters. The clause in the bill of lading providing that the defendants should have liberty to tranship entitled them to transfer the bags of rice to vessels of any kind including lighters. At the time when they became parties to the bill of lading the plaintiffs were aware that by arrangement between the Fruit Company and the defendants, a practice had been established at the port of Havana according to which the defendants were entitled in circumstances such as here existed to discharge the cargoes of the steamers of their line into lighters in order that they might eventually be discharged at the designated wharf; and unless that practice was unreasonable or was expressly or impliedly excluded from the contract by some clause of the bill of lading, it must be taken to be incorporated in the contract between the parties and to authorize discharge of the cargo in accordance with it. That practice is not unreasonable. Neither is it excluded by any clause of the bill of lading. The clause in the bill of lading providing that the bags of rice are to be delivered " from the ship's tackles " does not exclude discharge into lighters in accordance with the practice where that is otherwise permissible: *Marzetti* v. *Smith & Son.* (1) The clause in the bill of lading providing that the cargo is to be discharged at a wharf to be designated did not prevent the defendants from discharging the bags of rice into lighters in accordance with the practice, inasmuch as in the circumstances at the time existing it was only by discharge into lighters as an intermediate step that it was possible to effect eventual discharge at the designated wharf. There is no other clause in the contract which excluded the practice or rendered it improper in the circumstances for the defendants to discharge the bags of rice into the lighters. As the defendants have not broken the contract, all its provisions, including the exception clause, remain in force, and the defendants are protected by that clause against the loss of the cargo by the hurricane which was an act of God or a peril of the seas.

D. Davies K.C. in reply. The clause in the bill of lading giving the defendants liberty to tranship empowers them to transfer the cargo into another ship, but not to transfer it into a lighter or barge. On the contrary it impliedly prohibited transference of it into such craft, and therefore excluded the practice in question from the contract between the parties. If that clause does purport to authorize a transfer of the cargo into barges, it is rendered void and of no effect by art. III., r. 8, of the Hague Rules.

BRANSON J. This case raises a rather interesting point. The plaintiffs were the holders of a bill of lading dated June 4, 1933, and the owners of 500 bags of rice shipped under it at Rangoon for carriage to and delivery at Havana on board

(1) 49 L. T. 580.

the defendants' steamer, the *Tapti*. The case has been argued on agreed facts. The short point of fact which has given rise to the trouble is that when the *Tapti* reached Havana, in pursuance of a practice which ships of the Nourse line adopt there, she put the 500 bags of rice into lighters for conveyance—I want to use neutral language—from the ship's side to the wharf. While the rice was on board the lighters for this purpose a hurricane visited the port of Havana, with the result that the lighters were sunk and the rice was lost.

The action is brought to recover the value of the rice. The defence is that the bill of lading contained the usual exceptions of the act of God and perils of the sea, that the contract of carriage contained in the bill of lading was still in full force and effect, and that the defendants are protected by the exceptions therein contained. The plaintiffs, on the other hand, contend that, by reason of the fact that the rice was put from the ship into the lighters, the contract of carriage was broken and determined, and that consequently the exceptions no longer apply, and the defendants are under their common law liability to deliver the goods which were given to them to carry, or pay the damages arising from their not doing so.

The question, then, which I have to determine is, whether the contract of carriage permitted the putting of the rice into the lighters, as the defendants allege it did, or whether that act constituted a breach of the contract, as the plaintiffs allege it did. This must depend upon the construction to be placed upon the language of the contract. The material parts of the bill of lading are: "Shipped in good order and condition by Damjee Lakhamsee & Co., of Rangoon, on board the steamship *Tapti* . . . . lying in the port of Rangoon, and to be delivered at Havana." Then there is a clause: "with liberty to tranship or land and re-ship on board the same or any other vessel or vessels." Then there is a clause which says that the goods are "to be delivered in the like good order and condition from the ship's tackles (when the ship's responsibility shall cease) at the aforesaid port of Havana." Then come the exceptions which include the act of God and perils of the sea. These provisions are in the printed part of the bill of lading, and a clause in writing is added: "Cargo to be discharged at a wharf to be designated by the ship's agents."

I now turn to the agreed statement of facts, which shows the circumstances in which these bags of rice were put on board the lighters. They are these: On August 29, 1933, the *Tapti* went alongside her berth at the Santa Clara wharf of the United Fruit Company in the port of Havana. This wharf had been designated by the ship's agents for the purpose of discharging the bags of rice. It was the wharf used by the defendants for discharging their cargoes, and by the terms of their use of it whenever the Fruit Company have a vessel of their own to discharge at the wharf the defendants' vessels are obliged to vacate it, and are moved into the stream, the Fruit Company sending lighters to take delivery of the cargo and ultimately discharging it from the lighters on to the wharf. The plaintiffs were aware that this procedure was frequently adopted by the defendants and the Fruit Company. On August 31 before any of the 500 bags of rice had been discharged from the *Tapti*, she was removed by the defendants from the said wharf to an anchorage in the stream, the Fruit Company requiring the wharf for one of their own vessels. Pursuant to the arrangement above stated the 500 bags of rice were discharged by the defendants into lighters as the *Tapti* lay at her anchorage in the stream. Except in so far as the bill of lading might otherwise provide the plaintiffs did not authorize or assent to the discharge into lighters, and they were in no sense a party to the arrangement between the defendants and the Fruit Company except in so far as the plaintiffs' knowledge of the practice might affect the question.

Those being the facts which have been agreed, was there any breach of this contract of carriage? The plaintiffs say that the contract involves an obligation upon the ship to take the goods alongside a wharf in the ocean-going steamer and from that steamer to land the goods at the wharf by the ship's tackles. It is said that the placing of the goods upon the lighters was a breach of the contract of carriage. The defendants deny this, and say in the first place, that the contract was to take the goods to the port of Havana and there discharge them in any usual way; that the practice of this line was in the circumstances a usual way of discharging the goods; and that, therefore, unless there can be found in the contract some express prohibition, this usual way might be adopted in fulfilment of this contract of carriage, and did not constitute a breach of it. As a proposition of law that seems to me to be sound. Where there is a custom of the port, a bill of lading is always construed as having been entered into with reference to that custom, and, unless express words appear in it excluding that custom, discharge in accordance with that custom has been held over and over again to be a proper discharge in accordance with the contract. Where it is found as a fact, as has been found by agreement in this case, that a well-known practice is adopted by a line of steamers in dealing with cargo at a particular port, and the receiver of the cargo knows of that practice, it seems to me that, unless something can be found in the words of the contract excluding the operation of that practice, it is not open to the plaintiff to complain that that practice has been followed. Counsel for the plaintiffs submits that there are words in this contract which do exclude the practice. He says that the liberty to tranship which is given in the bill of lading does not apply to transhipment into craft, but only to transhipment into another ocean steamer. I see nothing in the language to make it right to so restrict the meaning of the word "tranship." If one pushed the argument to the extreme it would mean that the transhipment would have to be made by laying the two ocean steamers alongside, which, though not impossible, is so unusual a performance that one cannot help thinking that the words were not intended to have this construction. In my view, the expression "liberty to tranship" is sufficiently wide to cover a liberty to put goods into lighters in order to complete the voyage, and, if that is correct, the putting of the goods into these lighters in accordance with the practice which the Nourse Line, to the knowledge of the plaintiffs, used in the port of Havana would come within the express liberty reserved. There is nothing in the meaning of the word "tranship" as used in the bill of lading which can be relied on as excluding a recourse to that practice.

It is said that the whole of this clause giving liberty to tranship is rendered void by art. III., r. 8, of the Hague Rules, which are appended to the Indian Carriage of Goods by Sea Act, 1925. I cannot think that there is any substance in this point. Art. III. is an article providing that the carrier must exercise due diligence in certain respects, and r. 8, upon which Mr. Davies relies, provides that "any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article, or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect." I cannot see how a liberty to tranship comes at all within the prohibition of that clause.

Then it is said that the use of the expression "from the ship's tackles (where the ship's responsibility shall cease)" renders it impossible not to read the bill of lading as excluding this well-known practice of the Nourse Line. I think the answer to that contention is to be found in the case of *Marzetti* v. *Smith & Son.* (1) It is true that what was there in issue was a custom of the port of London, while what is here in issue, is not a general custom of a port, but a well-known practice of the particular line which has issued the bill of lading. But just as there it was held that a custom to discharge goods on to the quay and thence into lighters was not inconsistent with the terms of a bill of lading which provided that the goods should be delivered from the ship's tackles, so here, as it seems to me, the practice according to which the goods are put by an intermediate process into lighters and then by a final process from the lighters on to the wharf is not inconsistent with the terms of the bill of

(1) 49 L. T. 580.

lading requiring that the goods are to be delivered from the ship's tackles.

In my view, the contract read, as I think one may fairly and properly read it, in the light of the surrounding circumstances known to the parties, has not been broken by the delivery of these goods by the use of the lighters as a step in the delivery of the goods at the wharf. Had the circumstances been different, and had the goods been dealt with not in accordance with the practice, different considerations would have applied; but, once one comes to the conclusion that this method of putting the goods ashore was a method in the contemplation of the parties and not excluded by the written terms of their contract, it is impossible to say that the contract of carriage has been broken and that the exceptions contained in the bill of lading no longer apply.

For these reasons I think that the plaintiffs' case must fail, as it is clear that if the exceptions continue to apply they are wide enough to cover the loss of this rice.

Judgment for defendants.

Solicitors for plaintiffs: *Parker, Garrett & Co.*
Solicitors for defendants: *Holman, Fenwick & Willan.*

J. R.

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Jan. 17, 20.

KITCHENER *v.* EVENING STANDARD COMPANY, LIMITED.

[1935. K. 756.]

Sunday observance—Entertainment " to which persons are to be admitted by the payment of money "—Previous advertisement—Liability of advertiser—Sunday Observance Act, 1780 (21 *Geo.* 3, *c.* 49), *s.* 3.

In an action by a common informer claiming penalties under s. 3 of the Sunday Observance Act, 1780, against the defendants as " persons advertising, or causing to be advertised, any public entertainment on the Lord's day, to which persons are to be admitted by the payment of money " :—

Held, that what is to be looked at, in order to ascertain whether the advertisement offends against the section, is the intention of the advertiser at the time of publication, not what is in fact done afterwards. But the intention of the advertiser, being a question of fact, may be proved, if the wording of the advertisement is not such as to be conclusive, by any relevant evidence, including what was in fact done afterwards.

ACTION tried by Atkinson J.

The plaintiff Eric Edward Kitchener, suing as a common informer, claimed from the defendants, the Evening Standard Company, Ld., proprietors and publishers of the Evening Standard, 850*l.* as penalties under s. 3 of the Sunday Observance Act, 1780. (1)

The plaintiff alleged that on each of seventeen days between June 15 and October 12, 1935, inclusive the defendants printed and/or published contrary to that section an advertisement of public displays of all-in wrestling to take place on the seventeen Sundays following the respective insertions of the advertisement, at New Vale Hall, Kilburn, and Lane's

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(1) Sunday Observance Act, 1780, s. 3: " . . . . Any person advertising, or causing to be advertised, any public entertainment . . . . on the Lord's day, to which persons are to be admitted by the payment of money, or by tickets sold for money, and any person printing or publishing any such advertisement, shall respectively forfeit the sum of fifty pounds for every such offence, to any person who will sue for the same."

Reporter's Note.—" The Sunday Observance Act, 1780 " (*sic*) is the short title given in the Short Titles Act, 1896, apparently in error, for as is clear from the regnal year the Act was passed in 1781.

London Club No. 2, 11A Queen Street, Hammersmith, to which persons were to be admitted by tickets sold for money. The defendants pleaded "Not guilty by statute."

All the advertisements relating to Lane's London Club ended with the words "Prices 3s. 6*d*., 2s. 0*d*., 1s. 6*d*., all reserved." Those relating to the New Vale Hall ended with the words "Prices: Reserved 4s. 6*d*., 3s. 6*d*., 2s. 0*d*. Unreserved 1s. 0*d*." The plaintiff attended two of the entertainments at Lane's London Club on July 21 and July 28, and was charged for admission. There was in fact no free admission on either occasion.

The plaintiff at the trial asked leave to make certain very trifling amendments in his statement of claim, amounting to no more than the correction of a date from the 29th to the 28th of July and the correction of the name of the New Vale Hall to the Vale Hall, and two other trivial verbal corrections. These amendments were objected to, but Atkinson J. allowed them.

Gerald A. Gardiner and *W. Russell Lawrence* for the plaintiff. The Court should allow the amendments, which are merely trivial corrections of verbal errors, by which no one is misled. Parliament, when it dealt with Sunday entertainments in 1932, left the action by a common informer as the remedy for breaches of the law. The common informer, therefore, ought not to be frowned on by the Court, nor refused assistance which would be given to an ordinary plaintiff.

As to the construction of s. 3 the words "are to be" admitted show that the section is aimed at advertisements of future entertainments at which the law is intended to be broken. The advertisement is the thing primarily to be looked at: if it is of the sort prohibited, it is immaterial that the actual entertainment, when given, may not offend against the Act, or that it may be abandoned. Were it not so, the guilt or innocence of the advertiser would be dependent on the future conduct of the promoters, which he could not foresee nor control.

Paley Scott K.C. and *St. John Field* for the defendants.

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Penal actions, especially those brought by common informers, have always been treated strictly. Amendments, even of a formal nature, ought not to be allowed at the trial. The fact that Parliament recently exempted certain specified entertainments from this Act is no indication that informers against those which are not exempted were intended to receive a more favourable position before the Courts than hitherto.

Before a defendant can be successfully charged as advertiser under s. 3, it must be shown that an illegal entertainment in fact took place and that the defendants advertised that entertainment. There is no evidence that entertainments in fact took place except on the two days when the plaintiff attended. As regards the other dates, in any event, the defendants ought to succeed. The advertisements are not inconsistent with free admission.

Gardiner in reply.

ATKINSON J. In this case the plaintiff sues the defendant company for penalties for publishing advertisements in the Evening Standard in breach of s. 3 of the Sunday Observance Act, 1780. He claims in respect of advertisements in seventeen issues between June 15 and October 12, 1935. The advertisements are all in respect of performances to be given on the following Sunday. It is not contested that the evidence has established that the defendants are the owners and printers of the newspaper. There is no doubt that the advertisements complained of advertised all-in wrestling exhibitions on the Sundays following the dates of the advertisements, in the afternoon at the New Vale Hall, Kilburn, and in the evening at Lane's London Club, 11 Queen Street, Hammersmith Broadway. The programmes are set out, I think, in all the advertisements, and the prices to be charged. Evidence was given as to two of the displays, those of July 21 and 28 at the hall in Hammersmith. The plaintiff saw both those entertainments. His description of what took place was not challenged and I am satisfied that his evidence was true. He had to pay to go in the sum of half a crown on each occasion, and there was, in fact, no free admission. There is no doubt that the performances were infringements of s. 1 of the Act, and the question here is whether the advertisements were within s. 3.

The first matter that arose was one of amendment, whether I should allow certain amendments of a very trivial nature which the plaintiff wished to make without, however, admitting the necessity for so doing. The first was to alter the word "of" to "on" in the title of the Act. (1) The next was to alter the date July 29 to July 28 in the list of displays. The next was to substitute "Broadway" for "W.6" in the address of the Hammersmith Hall. The last was to alter the description "New Vale Hall" to "The Vale Hall" in respect of the advertisement on October 12. Mr. Paley Scott urged very strongly that no help should be given to a plaintiff in an action based upon this statute. He said that there were no merits in the action, nothing to suggest that the defendants had not erred in ignorance of the fact that the advertisements were illegal or that the exhibitions were objectionable.

So lately as 1932 the Legislature has had this statute under consideration. Certain amusements were then taken out of it, but otherwise Parliament thought fit to leave the law as it was. This is not a case involving an isolated breach of either s. 1 or s. 3. It is alleged that these illegal performances were given persistently, Sunday after Sunday, performances which were not merely illegal in that they were forbidden by statute, but which were in the opinion, I should imagine, of most decent people, also unsuitable entertainments for Sunday. If ever the public interest can demand that this Act should be enforced, it demands it to stop performances of all-in wrestling on Sunday. Six days and six nights in the week are quite enough for such displays. The plaintiff, whatever his motive, is in fact acting, I think, in the public interest in endeavouring to put the Act into force. I am quite satisfied that he genuinely disapproves of what he saw and genuinely thinks that these exhibitions ought to be stopped. Of course he has been led to take these proceedings because of the inducement offered by the Act; but, after all, that is exactly what Parliament intended and hoped. In the absence of any evidence, I cannot accept Mr. Paley Scott's suggestion that the defendants were ignorant of the fact that they were breaking the law or of the nature of these entertainments. The whole matter of this Act has been very much to the fore within the last few years and the defendants must have known that they were advertising illegal performances. Those responsible for a great paper like this must surely know with precision what advertising is legal and what advertising is illegal, and they must be taken, I think, to know something about all-in wrestling. I may be wrong, but I think in this case a judge ought to be anxious rather than slow to make these amendments, which are obvious and trifling. The errors have misled no one. I therefore allow the amendments.

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(1) "An Act for preventing certain abuses and profanations on the Lord's day, called Sunday."

The defence rests upon the proposition that no offence is committed either under s. 1 or under s. 3 unless the entertainment is one for which there is a charge for admission. If there is free admission, although a charge may be made for a seat, an entertainment is not within the scope of the Act, and it is said that in this case if you look at the advertisements there is nothing there which is inconsistent with free admission. This contention raises the construction of s. 3. Three views have been presented. The first, which was presented by Mr. Gardiner in opening, as I understand it, is this: an advertisement speaks for itself, it does not matter whether the exhibition which is advertised is in fact given at all or whether, if given, no charge is made for admission. The only question is whether the advertisement advertises a performance on a Sunday which, according to the advertisement, is one to which people have to pay to go in. To that Mr. Paley Scott replies that if that is the true view there is nothing in any one of these advertisements which is inconsistent with free admission.

The next view was one suggested by Mr. Paley Scott, that unless there is in fact an illegal entertainment there can be

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no breach of s. 3, and that an advertisement cannot be held to be within that section unless in fact it is followed by a performance which is in breach of s. 1. He says that if he is right in that view then there is no evidence except as to two dates that any performance was in fact given at either of these halls. The third view, adopted in Mr. Gardiner's reply, was based upon the words, or rather, emphasizes the words "to which persons are to be admitted by the payment of money" and the suggestion then made was that an advertisement was within the section if it related to a performance for which it was intended that a charge should be made for admission. I do not think that the question of whether an advertisement is illegal can depend on what is in fact done. If that were so, an advertisement plainly unlawful according to its terms, an advertisement which plainly stated "no free admission" would not be a breach of s. 3 if the police stepped in at the last moment and stopped the performance. I cannot see any words in the section to justify that view. There is nothing there to suggest that the performance must indeed take place or that it must in itself be illegal. The only authority which has been called to my attention, as to the proper interpretation of this section is *Williams* v. *Wright*. (1) The report of the judgment is very short, but still I think it is clear enough to afford a guide to the proper interpretation of the section. In that case the advertisement was of a concert, and the relevant part as to the prices was this: "Tickets, 1s., 2s., 3s., and 5s. at Robert Newman's Box Office, Queen's Hall." The concert took place and in fact there was free admission. There was printed on the tickets sold: "Admission free. Reserved Seat 1s." I suppose as to the other seats it was "Reserved seat so much, 2s., etc." At any rate on every ticket apparently were the words "admission free" and it was clear that a charge was only being made for the seat. It was held there by Collins J., that there was nothing wrong about the advertisement, and he said that "he decided the case on Mr. Russell's second point, that on the ticket was printed

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(1) (1897) 13 Times L. R. 551.

'admission free.' The fact that 1s. was charged for a reserved seat was not incompatible with the admission being free. The statute spoke of admission, not to a seat, but to an entertainment." I think that that amounts to this, that it was not proved that the concert advertised was one to which it was intended that the public were to be admitted only on payment of money. It was proved that in fact admission was free, and the learned judge took the view that the advertisement was consistent with such an intention. Therefore it was impossible to say that the advertisement was of a concert to which the public were to be admitted on payment. I cannot think that the case would have been decided the same way if in fact there had been no free admission. I think the argument as to the advertisement being consistent with free admission was treated in this way: it is a question of intention: if it be proved that in fact there was free admission and that the advertisement is consistent with free admission, it is impossible to find that it was at any time intended that there should be no free admission, and, therefore, the advertisement was not one which infringed s. 3. But if in fact there had been no free admission, I feel certain that the learned judge could not have held that it had not been intended to hold an entertainment to which there should be no free admission. I think that that case supports the third view presented, that you have got to look at the position at the time of the advertisement to see what was intended—what in truth was being advertised. You may, in order to get at what that intention was, look at what was done, because after all that is perhaps the best evidence of what the promoters were really intending. You may get clear evidence of that intention from the words of the advertisement. If the advertisement makes it perfectly plain that there is to be no free admission, that would probably be conclusive evidence as to what the intention was. You may have evidence from any other quarter as to what was intended. I think it is a question of fact, and to decide that question of fact the Court can look at what was really done, can look at the words in the advertisement and consider any other relevant evidence.

Applying that principle to this case, the advertisement relating to Lane's London Club, Hammersmith, ended up in every case with the words "Prices 3*s*. 6*d*., 2*s*. 0*d*., 1*s*. 6*d*., all reserved." That to my mind means this, that all the seats are capable of being reserved at one of those prices, and I am satisfied that no one could infer from that that there was any free admission. In fact we know that on July 21 and 28, the two dates with regard to which evidence was given, there was no free admission. I think that the evidence as to those two dates proves what the promoter meant by his advertisement, and I am driven to find as a fact that the performance advertised at Lane's London Club was on each occasion a performance to which persons were to be admitted only on payment. That was what the advertiser meant; it was what anybody reading the advertisement would take it to mean. As to the Vale Hall, the prices were described in this way: "Prices: reserved 4*s*. 6*d*., 3*s*. 6*d*., 2*s*. 0*d*., unreserved 1*s*. 0*d*." Again I am satisfied that the advertisement makes it quite plain that no one can get in without payment. It means that there are certain seats which may be reserved in advance, that there are a number of seats which cannot be reserved, that to get in you have to pay 1*s*. and take your chance of a seat in the unreserved part. Everybody would read the advertisement in that way. There again I think one is entitled to bear in mind the two performances given at the other hall, which of course show that the promoter never had any intention of letting people in free. He never pretended to be a philanthropist, and I am perfectly satisfied that the people who put in the advertisement and anybody who read it never had the faintest doubt about the matter of charges, and that no one would suppose for a moment that they could get in free if they were prepared to stand. At any rate, in the absence of any evidence to contradict this inference, I find as a fact that the advertisements as to the Vale Hall were advertisements of performances to which the public were to be admitted on payment. Of course, it is enough to condemn these advertisements if they are wrong as to one of the halls in question. But in my judgment the advertisements are an infringement of s. 3 as to both of the halls.

That being so, it seems to me that the alleged offences are complete and that the plaintiff is entitled to judgment for the sum claimed—namely, 850*l*. A judge deciding a case under this Act has no discretion at all as to what he is to award. It is a penalty which is either incurred or not incurred, and if as a matter of law it has been incurred, the penalty has got to follow.

If the Home Secretary attaches any importance to the judge's view in considering whether there ought to be remission, I do not want anything I have said or am saying to be taken to indicate that I think that there ought to be full remission; but I do think that there ought to be some, because if a view is taken that something which is going on is wrong, I think that an intending plaintiff ought to move quickly. It seems to me wholly unreasonable to lie by and let an offence be repeated week after week and then come forward with a very big claim of this kind. If anything I say has any bearing, that is a principle which I suggest ought to be taken into consideration.

Judgment for plaintiff.

Solicitors for plaintiff: *Lewis & Co.*
Solicitors for defendants: *Withers & Co.*

J. W. H.

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K. B. D.
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June 20.

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Nov. 6, 7, 8, 11, 12;
Dec. 20.

Rating—Industrial Hereditament—Unoccupied Mill—Machinery in or on hereditament—Process machinery—Beneficial Occupation—Valuation—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24, *sub-s.* 1, *and Third Schedule.*

By s. 24, sub-s. 1, of the Rating and Valuation Act, 1925: "(*a*) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule to this Act shall be deemed to be a part of the hereditament; (*b*) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament." The Third Schedule to the Act enumerates the classes of machinery and plant which are to be deemed to be part of the hereditament, such as motive machinery, or machinery and plant for the generation of power, heating, lifts and the like, without which the mill could not begin to work. When the machinery and plant referred to in the Third Schedule has been eliminated there is left the kind of machinery which is concisely described as process plant and machinery.

A mill was erected in 1884 as a cotton spinning mill, and equipped with plant and machinery. The mill was extended in 1905, and further plant and machinery was installed. In May, 1931, the above-named company, who were the owners and occupiers of the mill, stopped production, but the plant and machinery remained on the premises in the charge of an engineer, who acted as a paid caretaker, and who was the only person employed on the hereditament on April 1, 1933. The mill was occupied by the company in order to keep the plant and machinery in good condition.

Quarter sessions found as a fact that there was no beneficial occupation of the hereditament as a cotton mill, but they were of opinion that the company were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto and loose chattels:—

Held, by the Court of Appeal, reversing the Divisional Court, that s. 24 of the Rating and Valuation Act, 1925, only applied to the valuation of an industrial hereditament containing process plant and machinery which was in operation as a factory, and did not affect the rateable value of the hereditament while it was only occupied in order to keep the plant and machinery in good condition and was not being used as a factory; and that quarter sessions were right in holding that the company were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto and loose chattels and that the premises were rateable accordingly.

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Staley v. *Castleton Overseers* (1864) 5 B. & S. 505 and *Harter* v. *Salford Overseers* (1865) 6 B. & S. 591 applied and followed.

Case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by the Committee of Justices for the County of Lancaster appointed under s. 32, sub-s. 1, of the Act of 1925, by the court of quarter sessions for the County of Lancaster, sitting for the Hundred of Salford at the assize courts, Manchester.

1. (1) The case related to a certain part of premises known as the Townley Mill and situate in Hanson Street, in the borough and rating area of Middleton and in the assessment area of Oldham, which part is hereinafter termed " the hereditament."

2. On April 1, 1933, the whole of the premises constituting the said mill were assessed and described among the industrial hereditaments in the valuation list for the rating area of Middleton as a cotton mill, and were assessed at 1437*l.* net annual value and 359*l.* rateable value.

3. On April 1, 1933, Townley Mill Company (1919), Ld. (hereinafter called " the company "), who were the owners and occupiers of the mill, made a proposal for the amendment of the valuation list in the following respects: (1.) By the separation and valuation as a separate hereditament of two rooms, comprising the whole of the warehouse in the basement of the mill, then let off and in the occupation of the Yorkshire Dyeing and Proofing Company, Ld. (2.) By the reduction of the net annual and rateable values of the mill to nil or nominal values.

The grounds on which that proposal was made were (inter alia) as follows:—(1.) That the rooms let off as aforesaid were in separate occupation and constituted a separate hereditament. (2.) That the mill could not reasonably be expected to let from year to year or at all and had no letting or net annual or other value for rating purposes. (3.) That there was no beneficial or rateable occupation of the mill.

4. On June 22, 1933, the company's proposal was heard by the Oldham Assessment Committee.

(1) These numbers correspond to the numbered paragraphs of the case.

5. By their decision, of which notice was given on September 18, 1933, the Assessment Committee expressed themselves as agreeable to the assessment of the portion of the mill let off to the Yorkshire Dyeing and Proofing Company, Ld., as a separate hereditament but otherwise entirely rejected the proposal of the company for the amendment of the valuation list to nil or nominal value on the ground that the premises were in beneficial occupation.

6. The company gave notice dated October 4, 1933, of appeal to quarter sessions.

7. On October 25, 1933, the company delivered a statement of their case, and on November 30, 1933, the Assessment Committee delivered a statement of their case.

8. The appeal was heard by the justices on May 28 and 29, 1934, and was dismissed with costs. Application was made to the justices to state a case for the consideration of the King's Bench Division of the High Court of Justice and the justices accordingly stated this case.

9. At the hearing before the justices the following facts with reference to the mill were either admitted or proved in evidence:—

(1.) The structure of the mill was erected in 1884 by the Townley Mill Company, Ld., as the edifice of a cotton spinning mill, and motive plant, blowing room machinery, cards, draw frames, slubbers, intermediate frames, rovers, mules and other machinery necessary for the working of a cotton spinning mill were made for the structure and assembled and installed by that company in the structure.

(2.) The structure was extended in 1905 by the Townley Mill Company and plant and machinery of the description set out in sub-para. (1.) above were made for the extension and assembled and installed by the company in the extension.

(3.) Both the original structure and the extension were specially designed to contain and support plant and machinery of the description and dimensions of the plant and machinery made, assembled and installed as aforesaid.

(4.) Much of the plant and machinery installed in 1884

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and 1905 still remained, but from time to time machines had been ordered, made, assembled and installed, to take the place of original machines which had become worn out, defective or otherwise unsuitable for further use.

(5.) A schedule of the plant, machinery, accessories and loose chattels in and on the premises on April 1, 1933, was contained in the company's statement of case. The schedule was arranged as follows :—

Category I.—Machinery and plant within s. 24, sub-s. 1 (*a*), of the Rating and Valuation Act, 1925.

Category II.—Machinery and plant within s. 24, sub-s. 1 (*b*), of the Rating and Valuation Act, 1925.

Sub-category A.—Fixed machinery. Sub-category B.—Loose accessories (all of which have been used in or on the various machines and which are interchangeable and essential parts). Sub-category C.—Loose accessories to machinery and plant in Category I. and Category II., Sub-category A, necessary for the working of the machinery and plant used in connection therewith.

Category III.—Loose chattels.

(6.) The accessories set out in Category II., Sub-categories B and C, of the said schedule were part of and went with plant and machinery in Category I. and Category II., Sub-category A, and were accessories to such plant and machinery.

(7.) Copies of the plans of the mill showing the plant and machinery are numbered 6 and there are shown thereon :—

133 frames of which :—

127 are long frames, 34 feet to 121 feet long, weighing from 92 cwts. to 212 cwts. each.

6 are shorter frames, 17 feet long, weighing 3 tons each.

3 opening ranges, weighing 277 cwts. each.

105 carding engines, 10 feet long and weighing 3 tons each.

5 scutchers, 15 feet 7 inches long and weighing 67 cwts. each.

All these machines having to be brought in pieces and assembled and erected in situ. They could not be installed in any other way.

(8.) The whole floor space of the mill was 23,408 square yards of which 2409 square yards were occupied by motive plant and machinery (that is to say plant and machinery in Category I.); 18,894 square yards were occupied by process plant and machinery (that is to say plant and machinery in Category II., Sub-category A.); 2105 square yards were let off to the Yorkshire Dyeing and Proofing Company, Ld. Of the floor space occupied by process plant and machinery 72·4 per cent. was occupied by mules weighing from 92 to 212 cwts. each, and screwed to the floor, but the screws could be easily removed. The whole of the floor space on the floors shown on plans H, J, K and L and part of the floor space on the floor shown on plan G were fully occupied by mules.

(9.) The remaining 27·6 per cent. of the floor space occupied by process plant and machinery, as shown on plans F and G, was occupied by process plant and machinery consisting of opening machinery, cards, drawing frames, slubbers, intermediate frames and roving frames. The opening machinery was interconnected by dust suction pipes which pipes were bolted to the ceiling beams. Of the other machines mentioned in this sub-paragraph some were screwed to the hereditament, which screws could be easily removed. Other machines were large and heavy structures erected in their positions weighing from 21 to 115 cwts. and were not fixed otherwise than by their own weight.

(10.) The warehouse portion of the mill had been let off to the Yorkshire Dyeing and Proofing Company, Ld.

(11.) The floor space occupied by the process plant and machinery would have been suitable and available if it had not been occupied by process plant and machinery for warehousing or other purposes, but in some cases adaptation or alteration of the premises would have been necessary but not to any substantial extent.

(12.) The mill was worked as a mill from the year of its erection down to the time specified in the following subparagraphs.

(13.) The company were incorporated in 1919 to acquire the mill and having acquired it they continued the production of yarn therein down to May, 1931.

(14.) In the month of May, 1931, the company stopped production and retained only a staff of three—namely, manager, secretary and engineer at reduced salaries.

(15.) The company continued the sale of yarn and cotton waste from the month of May, 1931, down to September, 1931, by which time all stocks were exhausted.

(16.) In the month of September, 1931, the company, save as hereinafter appears, closed down the mill.

(17.) In March, 1932, the services of the manager were terminated.

(18.) As from the month of April, 1932, the company were willing and ready to sell or let the mill.

(19.) In or about April, 1932, the company offered to sell or let the mill to the Yorkshire Dyeing and Proofing Company, Ld., but that company declined to buy or rent, save that they agreed to rent and did rent a portion of the basement, which contained no plant or machinery, as a warehouse for goods.

(20.) In June, 1932, as part of a scheme to let empty mills in the district the company advised the Lancashire Industrial Development Council that they were willing to sell or let the mill, and that council inspected the mill but did not enter into negotiations. The company did not advertise the mill for sale or to let nor did they put it in agents' hands for either of such purposes.

(21.) In August, 1932, the company sold the mill stores.

(22.) In October, 1932, the company stripped the rovings from the bobbins and sold them to a waste dealer at a considerably less price than it would cost to refill the creels.

(23.) As from October, 1932, and during the whole period of the succeeding rating year the company did not restart the mill.

(24.) In December, 1932, the secretary of the company resigned.

(25.) On February 21, 1933, the company ceased to occupy the offices of the mill as their registered address.

(26.) On April 1, 1933, the only person employed on the premises was the engineer, who was employed at a wage of *2l.* 12*s.* 6*d.* per week as against his former salary of 6*l.* per week as engineer.

(27.) In the winter it was the engineer's duty to maintain steam in one boiler and in summer if he thought necessary for the preservation of the mill and its contents, but heat was not otherwise maintained in the mill. It was the engineer's duty to look after the machinery and in so far as it was necessary to keep the machinery in order it was his duty occasionally to turn the shafting by barring the engine and the machinery by hand, which in fact was done.

(28.) The whole of the plant and machinery was maintained in position.

(29.) The hereditament was occupied by the company to some extent for the purpose of keeping the plant and machinery in repair and good condition.

(30.) It was of benefit to the company as owners of the building, plant and machinery that the plant and machinery should remain on the premises and be preserved from depreciation.

(31.) The capital value of the loose chattels on the premises was very small and the rent which a hypothetical tenant would pay to store them would be insignificant.

(32.) Save as aforesaid there was no user of the hereditament.

(33.) At the hearing it was contended by the company and found by the Court that there was no beneficial occupation of the hereditament as a cotton mill.

10. The valuation of the Assessment Committee was upon the basis of a hypothetical clearance of the plant and machinery from the mill and upon the letting value of the premises, so cleared, for use for other purposes, including their use as a warehouse.

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11. For the company it was contended that :—

A. The questions which should be considered by the Court were :—

(1.) On the facts at the material date was the hereditament properly described as a cotton mill ?

(2.) Was the process machinery part of the hereditament ?

(3.) Having regard to s. 24 of the Rating and Valuation Act, 1925, was valuation on the basis of *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers* (2) still open to the Assessment Committee ?

(4.) Was the respondents' basis of valuation open to them ?

(5.) In treating the premises as a warehouse, ought it to be ascertained what plant or articles were fixed so as to become part of the warehouse, and what capacity there was for warehousing purposes and what things were warehoused ?

(6.) If any, and, if so, what, alteration of the list should be made ?

B. That each of the questions numbered 1 to 6 above should be answered in favour of the company.

C. That *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers* (2), if they decided that the process plant and machinery of a cotton spinning mill were not part of the hereditament, were wrongly decided.

12. For the Assessment Committee it was contended that :—

A. The company were in beneficial occupation of the hereditament.

B. The company were in occupation of and using the said hereditament for the purpose of housing the process plant and machinery, accessories thereto and loose chattels and must be regarded as in rateable occupation thereof.

C. The process plant and machinery were not part of the hereditament.

D. Having regard to the terms of s. 24 of the Rating and Valuation Act, 1925, it was not open to the company to

(1) 5 B. & S. 505.

(2) 6 B. & S. 591.

contend that the process plant and machinery were or were to be deemed to be part of the hereditament.

[Para. 13 contained a list of cases cited to the justices.]

14. The justices were of opinion and held that the company were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto, and loose chattels. They accordingly dismissed the appeal with costs.

The company appealed to the Divisional Court.

15. The question upon which the opinion of the Court was desired was whether on the above stated facts the justices came to a correct determination and decision in point of law and if not what should be done in the premises.

Tom Eastham K.C. and *R. W. Leach* for the company. The justices were of the opinion that the company were in beneficial occupation of the hereditament, not as a cotton mill, but by reason of the warehousing therein of the process plant and machinery, accessories thereto and loose chattels. The capital value of the loose chattels on the premises was very small. The accessories can be ignored, because they were held to be part of the plant and machinery. It is submitted that there is no beneficial occupation of the hereditament. If there was any beneficial occupation by reason of the presence of the few loose chattels, the rateable value of the hereditament should be nominal, as the justices found that the rent which a hypothetical tenant would pay to store them would be insignificant. The plant and machinery was not being warehoused. It was part of the hereditament and could not be regarded as being warehoused. [They referred to *Holland* v. *Hodgson* (1); *Vaudeville Electric Cinema, Ld.* v. *Muriset* (2); *Mather* v. *Fraser* (3); *Monti* v. *Barnes* (4); *Boyd* v. *Shorrock* (5); *D'Eyncourt* v. *Gregory*. (6)] The justices were wrong in not determining what was part of the hereditament and what was not. In other words, if the cotton mill in

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(1) (1872) L. R. 7 C. P. 328.
(2) [1923] 2 Ch. 74.
(3) (1856) 2 K. & J. 536.
(4) [1901] 1 K. B. 205.
(5) (1867) L. R. 5 Eq. 72.
(6) (1866) L. R. 3 Eq. 382, 396.

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question is to be regarded as a warehouse, the justices have not dealt with the question what was the warehouse and what was being warehoused. The justices misunderstood and misapplied *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers*. (2) They also failed to give effect to s. 24 of the Rating and Valuation Act, 1925, which altered the law relating to the rating of machinery. The section divided plant and machinery in or on industrial hereditaments into (*a*) motive plant and machinery, which was to be deemed to be part of the hereditament; and (*b*) process plant and machinery, of the value of which no account should be taken in ascertaining the rateable value of the hereditament. A building which is not a warehouse in itself does not become a warehouse by the mere fact of machinery remaining in it. The inferences from the findings of fact of the justices in this case are that everything in or on the hereditament was part of the hereditament except a few insignificant items which can be ignored, and there is no warehousing. Moreover, the value of process plant and machinery in or on the hereditament is to be ignored in ascertaining the rateable value of the hereditament. The assessment should be reduced to a nominal sum.

W. T. Monckton K.C. and *F. Bancroft Turner* for the Assessment Committee. It is submitted that the true view is that the hereditament in question has some value for purposes other than that of a cotton mill—namely, for use as a warehouse. The question is whether the Rating and Valuation Act, 1925, has destroyed the doctrine that although an industrial hereditament has ceased to be occupied as such, it still has some value by reason of the plant and machinery contained in it. The object of s. 24 of the Rating and Valuation Act, 1925, was to get rid of the effect of the decision in *Kirby* v. *Hunslet Union Assessment Committee* (3), that machinery which is stock-in-trade must be taken into account in ascertaining the rateable value of the hereditament, whether the machinery is attached to the freehold or not. It is conceded that the

(1) 5 B. & S. 505.

(2) 6 B. & S. 591.

(3) [1906] A. C. 43.

bulk of the machinery in this case is "process machinery" and is attached to the freehold and that there is no beneficial occupation of the hereditament as a warehouse, but it is submitted that there is beneficial occupation of the hereditament as a store for housing machinery. The appeal should be dismissed.

Lord Hewart C.J. This is a case stated by justices for Lancashire, under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90). It has to do with a part of certain premises known as Townley Mill, in the borough of Middleton, in the assessment area of Oldham, and the question which this Court has to consider arises in the following way. On April 1, 1933, the whole of the mill premises were assessed and were described among the industrial hereditaments in the valuation list for Middleton as a cotton mill. The figures are immaterial.

On April 1, 1933—an important date under recent legislation—the company made a proposal for the amendment of the valuation list in two respects. One amendment was for the separation and valuation as a separate hereditament of two rooms, comprising the whole of the warehouse in the basement of the mill, then let off to and occupied by a company called the Yorkshire Dyeing and Proofing Company, Ld. With regard to that part of the matter there is no longer any dispute. The second proposed amendment was for the reduction of the net annual and rateable values of the mill to nil or nominal values. On June 22, 1933, the company's proposal was heard by the Assessment Committee for the assessment area of Oldham, and by the decision of September, 1933, the Assessment Committee accepted the proposal for the assessment of the part of the mill which had been let off to the Yorkshire Dyeing and Proofing Company, Ld., as a separate hereditament, but save in that respect they wholly rejected the proposal of the company for the amendment of the valuation list to nil or nominal values. That decision having been given, notice of appeal was given under the terms of the statute, and in May, 1934, the appeal was heard by

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the court of quarter sessions in Manchester, and was dismissed with costs.

Application was made for the statement of a case for the consideration of this Court, and accordingly this case was stated. The question raised by the case is, as usual, whether, upon the facts found, the justices came to a correct determination and decision in point of law and, if not, what should be done.

The statement of the case fills many pages in the document which is before us. The most significant parts of it may, I think, be shortly summarized. It is found as a fact that the structure of the Townley Mill in Middleton was erected in 1884 for the purpose of a cotton spinning mill and the motive plant, blowing room machinery, cards, draw frames, slubbers, intermediate frames, rovers, mules and other machinery necessary for the working of a cotton spinning mill were made for the said structure and assembled and installed in the structure. There was an extension of the structure in 1905, and further plant and machinery were made for the extension and were assembled and installed in what is called the extension.

For the purposes of the case, a schedule of the plant, machinery, accessories and loose chattels has been drawn up. That schedule consists of three categories. The first category consists of what is conveniently called motive plant and machinery; the second category consists of machinery and plant which are called process plant and machinery, that is to say, machinery used in the actual working or manufacture; and finally, there is a third category consisting of loose chattels. With regard to the loose chattels, no question any longer arises. The case finds, and it is common ground, that they were in fact insignificant. They do not enter into the question at all. With regard to the accessories which form a part of the process plant and machinery, we are told, and it is common ground, that the accessories set out under what is called Category II. of the schedule were in fact all the accessories. There were no others.

In May, 1931, as the case finds, the company stopped production. They retained only a staff of three persons, and those at reduced salaries. Afterwards, in September, 1931, with slight exceptions, they closed down the mill. In March, 1932, they put an end to the services of the manager, and from April, 1932, or thereabouts, the case finds that the company were willing and ready to sell or let the mill. They made an offer in April, 1932. In August they sold the mill stores, and from October, 1932, and during the whole period of the then succeeding rating year, the company did not restart the mill. In December, 1932, the secretary resigned. In February, 1933, the company ceased to occupy the offices of the mill as their registered address. On April 1, 1933, the crucial date, the only person employed on the premises was, we are told, the engineer, at a salary of 52*s.* 6*d.* per week as against a former salary of 6*l.* per week.

Finally, not to recapitulate the case unnecessarily, the court of quarter sessions found as a fact that there was no beneficial occupation of the hereditament as a cotton mill, but after hearing protracted argument, the court of quarter sessions came to a conclusion which is at any rate expressed with undoubted brevity. They were of opinion, they say, that the company were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto and loose chattels, and accordingly they dismissed the appeal with costs.

That is all the light which is thrown upon the view, taken by the court of quarter sessions, of the law applicable at this time to this matter. In my opinion, the court of quarter sessions, in so deciding, failed to come to a correct determination and decision in point of law. The matter of fundamental importance, as it appears to me, depends upon particular provisions of the Rating and Valuation Act of 1925, and especially upon s. 24 of that statute. That section occurs in the Part of the Act which is headed "Valuation Lists." Sect. 24, sub-s. 1, is in these terms: "For the purpose of the making or revision of valuation lists under this Part of this Act, the following provisions shall have

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effect with respect to the valuation of any hereditament "— I leave out words which are not relevant to the present matter—" (*a*) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule to this Act shall be deemed to be a part of the hereditament: (*b*) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

When one turns to the Third Schedule of the Act, it is apparent that it enumerates that type of machinery and plant which is conveniently described in the case as motive machinery; it is the machinery without which the mill could not begin to work, as, for example, the generation of power, heating and cooling, lifts and elevators, railways, tramlines and tracks, and other things, the foundation of that which was to become the work of the mill. When the machinery and plant referred to in the Third Schedule are eliminated, what is left is the kind of machinery which is concisely described in this case as process plant and machinery, operative plant and machinery, working and manufacturing plant and machinery. By s. 24, sub-s. 1 (*b*), no account is to be taken of the value of any plant or machinery of that kind in or on the hereditament. It appears, therefore, to be clear, so far as anything relating to the law of rating can be clear, that after the passing of the Act of 1925, there was a clear division of plant and machinery in hereditaments of this character, into two. On the one hand, there was the motive plant and machinery. That was to be deemed to be part of the hereditament itself. Apart from that machinery, there was the process plant or machinery, and that machinery comes within s. 24, sub-s. 1 (*b*), as plant or machinery of which no account is to be taken, or, to read the words precisely, " Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

What was the state of affairs prevailing at the time when that legislation was passed? The law is clearly stated in more than one passage in well known judgments, nowhere, perhaps, if I may respectfully say so, more clearly than in the speech of Lord Halsbury in the well known case of *Kirby* v. *Hunslet Union Assessment Committee* (1), where Lord Halsbury said: "It is enough, to my mind, to say that for a period of certainly more than half a century, erroneously according to the learned counsel who last addressed us, but undoubtedly in fact, judges of the greatest eminence have recognized the fact that although a particular set of machinery may, by reason of the peculiarity of the manufacture, or what not, be not affixed to the freehold so as to become part of the land, or hereditament, yet, if the thing is being so occupied, if the premises are being so employed, and the machinery in those premises is being so used as that it makes the factory appropriate to the particular industry carried on therein, the machinery itself is not to be disregarded in assessing the value of that thing occupied as it is, and used as it is, with the accommodation and furniture which is necessary for it to carry on the manufacture that is there being conducted." That passage puts quite succinctly the doctrine so long prevalent whereby although nobody professed in terms to rate machinery in a mill, nevertheless the value of that machinery, the worth and the utility of that machinery, were taken into account as enhancing the value of the hereditament to be rated. The hereditament was to be rated; the machinery was not to be rated, but the presence of the machinery in that place, at that time, was treated as something which enhanced the rateable value of the rateable hereditament.

It was in that state of affairs that this Act of 1925 was passed. Nobody can read this Act without perceiving that it is manifestly designed to relieve the rating of industrial hereditaments. A large and familiar set of provisions accomplished that purpose. Now let us turn to s. 24, with regard to the valuation of hereditaments containing machinery and plant. With all due deference to the extremely ingenious argument of Mr. Monckton, I cannot help thinking that for once, at any rate, the Legislature has made its meaning quite clear, that from this moment on, no matter what

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(1) [1906] A. C. 43, 47.

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happened before, machinery and plant must be of one of two kinds: if of one kind, motive machinery, it is part of the hereditament; if of another kind, no account was to be taken of the value of any such plant or machinery in or on the hereditament. Unless I wholly fail to understand the meaning of those words, the object and effect of that provision are to get rid, once and for all, of the old doctrine about the enhancement of the rateable value of hereditaments by reference to the plant and machinery on them. If that is so, the decision of this court of quarter sessions, if I may respectfully say so, is almost paradoxical. They have found that the rateable value appearing in the assessment was right and that the company were not entitled to succeed. But why?—not because of the machinery in the Third Schedule, but because precisely of the machinery referred to in s. 24, sub-s. 1 (*b*): in other words, the presence of that plant or machinery in or on the hereditament, the value of which could not be taken into account for the purpose of rating the hereditament, is the very thing upon which the court of quarter sessions relies for dismissing this appeal. They leave their view perfectly explicit and most briefly expressed: "We were of opinion and held that the company were in beneficial occupation of the hereditament by reason of the warehousing therein," of what? "of the process plant and machinery accessories thereto and loose chattels."

Mr. Monckton, it is true, has sought to argue that a particular and pregnant meaning must be put on that expression "the value" in s. 24, sub-s. 1 (*b*), of the Rating and Valuation Act, 1925. If I followed his extremely ingenious argument, it was this, that although under the statute no account is to be taken of the value of any plant or machinery in or on the hereditament, nevertheless account may be taken of the plant or machinery. But this part of this Act is dealing with valuation. The whole problem is valuation and on what line is the valuation to proceed, and it would indeed be a suspicious gift if Parliament were to say to persons interested in hereditaments of this character: we have listened to your request, we recognize the force of your

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argument, and from this time forward there shall be no more talk about enhanced values; no account shall be taken of process plant or machinery, in the sense that no account shall be taken of its value, but we are not to be understood as meaning that no account shall be taken of the plant or machinery. I cannot help thinking that legislation of that character would be rather in the nature of a trap. I cannot imagine any way in which account can be taken of plant or machinery for the purpose of valuation if the rating authority is prohibited, by statute, from taking account of the value of that plant and machinery. The argument appeared to be —it was not expressly put in these terms—that " value " here meant either some figure related to cost and diminished by depreciation, or the present worth of the machinery, and that the rating authority, notwithstanding this Act, could say that they would not look at the price of the machinery and the depreciation or the then current worth of the machinery, and yet in some other way they would take that plant and machinery into account as having a value capable of being expressed in terms of pounds, shillings and pence for the purpose of determining the full rateable value of the hereditament. If, indeed, that is the true conclusion, it seems to me an unfortunate conclusion, and I am clearly of the opinion that these words, in this Act, mean exactly what they say, that henceforth no account is to be taken of the value of any plant or machinery except that machinery, the motive machinery, which is enumerated in Schedule 3.

If that view is right, one looks at the earlier cases, and in particular such cases as *Staley* v. *Castleton Overseers* (1); *Harter* v. *Salford Overseers*. (2) Those are two typical cases. One looks at those cases with the reflection that they are long antecedent to the Act of 1925. *Staley* v. *Castleton Overseers* (1) was heard in the year 1864; *Harter* v. *Salford Overseers* (2) in the year 1865. As Mr. Eastham pertinently observed yesterday, if I may say so, whatever else those cases decided, they never decided what was part of the hereditament and what was not. They made no attempt

(1) 5 B. & S. 505.

(2) 6 B. & S. 591.

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to separate fixtures from chattels, and as for the quantum of the rateable value which resulted from the cases, that was a figure agreed between the parties.

Now what exactly were those cases? It is not necessary for me to refer to them. They are quite familiar. They were cases where by the accident of circumstances, over which the persons interested in the mills had no control, there had been a cessation of work. It was said that it was quite wrong in those circumstances, when war had put an end to the commercial value of a mill, to rate it as a prosperous going concern. But, on the other hand, it was said: "Be it so; nevertheless there is something here besides the land and the four walls and the roof; there is here useful machinery, and when the time comes to resume the manufacture which was carried on in those premises, the hypothetical tenant from year to year may well be expected to take into account—that expression occurs again and again in the decided cases on this matter—the fact that the machinery is there ready to turn when the moment comes." It was not that those places were rated as warehouses. Being what they were—namely, mills, they were subject to the view that although they were not doing any of the work of a mill, nevertheless they provided a convenient warehouse for the machinery in them. But why convenient? Because a time would come, or was expected to come, when the ordinary operations of the mill would be resumed. In other words, the point of the cases is that the hypothetical tenant is deemed to take into account the worth, the utility of the process plant and machinery. But is not that the very thing which now, since the year 1925, is excluded from the ambit of things which may be taken into account? The words seem to be designed with reference to the phrase which occurs again and again in the cases upon this matter: "no account" shall be taken of the value of any plant or machinery in or on the hereditament. I think, therefore, that the effect of this Act, intended to be an Act beneficial to those interested in the carrying on of industry, was to get rid of all the doctrine of enhanced value and to lay it down that what is called process plant and machinery must henceforth be disregarded where the problem is to ascertain the rateable value of the hereditament where plant and machinery are used. It is nothing to the purpose, in my opinion, to say apart from the use of the machinery and plant, there may be buildings called warehouses which for other commercial purposes do store or keep dry machinery and plant. It is not to be said that they are not to be rated because they contain machinery and plant. Of course, that could not be said. We are concerned with the rating of a hereditament which contains machinery and plant for the purpose of the carrying on of the work in that hereditament. The statute, in my opinion, makes it quite plain that in such a case and for such purposes, process plant and machinery are to be excluded.

I do not think it profitable or convenient again to review the long series of cases so properly and ably brought to the attention of the Court in this case. The argument, it seems to me, with all due respect to Mr. Monckton, has sometimes failed to appreciate the profound difference created by s. 24 of the Act of 1925. What view the court of quarter sessions took of that section we do not clearly know; they do not tell us. There is no judgment annexed to this case. The judgment is apparently expressed in three lines: "We were of opinion and held that the company were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery." The thing which could not be taken into account in the rating of the hereditament as a works is the thing and the only thing which is to be taken into account when the hereditament is being rated in slack times, or when work is suspended.

I cannot think that that is the true conclusion. There is undoubtedly occupation. Here is a hereditament, walls and roof, and there is machinery within it. I do not think that for any purpose regard can be had to the worth or the utility of that machinery, or to its cost price or to its present selling-price, if it has any. But there is occupation, and, to an infinitesimal degree, there is a beneficial occupation in that extremely limited sense. Holding that view, one has

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to consider what is to be done in the premises. That question also has been to no slight extent facilitated by the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49). By s. 25 of that Act, dealing with cases stated by quarter sessions, it is provided, in sub-s. 2—I leave out the immaterial words—that on the hearing of an appeal from a court of quarter sessions, the appellate court may give any judgment or make any order which ought to have been given or made by that Court.

I think, therefore, that the proper judgment here is that this appeal ought to be allowed, that the appeal at quarter sessions ought to have been allowed and that the figure in the assessment should be reduced to the nominal figure of *7l.*, which, as the result of some communication between the parties, the details of which I do not know, and into which I do not inquire, is to be treated as being in that event the appropriate figure. In these circumstances, I think this appeal ought to be allowed.

HAWKE J. I agree.

LAWRENCE J. I have come to the same conclusion. I think that the construction of s. 24 of the Rating and Valuation Act, 1925, is assisted by observing the category of hereditaments to which the section applies. Although the words of the section in that regard have not been investigated in the course of the argument, it seems to me that the words " other than a hereditament the value of which is ascertained by reference to accounts receipts or profits of the undertaking carried on therein," may have some bearing upon the construction of the section, excluding, as they appear to me to do, a warehouse which is really a warehouse, and showing that the hereditaments to which the section only has application are hereditaments which contain machinery and plant for the purpose of use therein.

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The Assessment Committee appealed. The appeal was heard on Nov. 6, 7, 8, 11, 12, 1935.

W. T. Monckton K.C., *Trustram Eve K.C.* and *F. Bancroft Turner* for the Assessment Committee. Quarter sessions were right in holding that the company were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery and were therefore rateable in respect thereof, and the Divisional Court were wrong in holding that the effect of s. 24 of the Rating and Valuation Act, 1925, was that the process plant and machinery in the company's mill must be disregarded in ascertaining the rateable value of the hereditament. It has been found in the case as a fact that the company are in occupation and that that occupation is of value to them and the only question is, What is the measure of that value? The company, who are the owners of the mill and in occupation of it, would as hypothetical tenant be prepared to pay for the benefit which they derive from the premises by warehousing therein the process plant and machinery independent of any consideration whether the machinery in question was in whole or in part part of the hereditament. In considering whether the process plant and machinery are part of the hereditament a distinction must be drawn between cases as between a rating authority and rating occupier and cases as between landlord and tenant or as between mortgagor and mortgagee. Having regard to the decision in *Chidley* v. *West Ham Churchwardens* (1), which must still be regarded as good law, this process plant and machinery cannot be regarded as being part of the hereditament for rating purposes. It was held in *Staley* v. *Castleton Overseers* (2) and *Harter* v. *Salford Overseers* (3) that a factory which was no longer used or intended to be used for its original purpose was nevertheless rateable as a storehouse for the machinery in it. Those cases are still good law and are not affected by s. 24 of the Rating and Valuation Act, 1925, and are conclusive in favour of the Assessment Committee. Sect. 24 of the Rating and Valuation Act, 1925, was intended to apply only to a factory in operation as a factory, and has no application to a factory which is being used as a storehouse for the machinery in it.

(1) (1874) 32 L. T. 486.

(2) 5 B. & S. 505.

(3) 6 B. & S. 591.

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[The following cases in addition were cited: *Tyne Boiler Works Co.* v. *Longbenton Overseers* (1); *Kirby* v. *Hunslet Union Assessment Committee* (2); *Smith & Sons* v. *Willesden Union Assessment Committee* (3); *Consett Iron Co.* v. *Durham County Assessment Committee* (4); *London County Council* v. *Hackney Borough Council* (5); *Jones* v. *Mersey Docks & Harbour Board* (6); *London County Council* v. *Erith Churchwardens* (7); *Liverpool Corporation* v. *Chorley Union Assessment Committee* (8); *Borwick* v. *Southwark Corporation* (9); *Rex* v. *Melladew* (10); *Holland* v. *Hodgson.* (11)]

Tyldesley Jones K.C., *Tom Eastham K.C.* and *R. W. Leach* for the company. The decision of the Divisional Court was right. Sect. 24 of the Rating and Valuation Act, 1925, expressly provides by sub-s. 1 (*b*) that in making up the valuation list no account shall be taken of any machinery which does not fall within sub-s. 1 (*a*). There is nothing in s. 24 which limits its operation to plant or machinery in a factory in operation, therefore this process plant and machinery in the company's mill must be disregarded in ascertaining the rateable value of the hereditament. Further, on the findings of the case the whole of the process plant and machinery is, as between landlord and tenant, affixed to and therefore in law a part of the hereditament of which the landlord is the owner, and if any benefit of pecuniary value accrues from the preservation of the mechanical parts of the hereditament that benefit is enjoyed by the landlord, and not by the hypothetical tenant who gains nothing by it, and therefore would pay no rent for it in order to preserve his landlord's property. The hypothetical tenant in occupation of the hereditament would get no benefit from his occupation because the machinery is part of the hereditament which on the statutory hypothesis would be let to him, and as owing to the trade prospects there would be no inducement for him

(1) (1886) 18 Q. B. D. 81.

(2) [1906] A. C. 43.

(3) (1919) 89 L. J. (K. B.) 137; 121 L. T. 244.

(4) (1930) 46 Times L. R. 223. In H. L. [1931] A. C. 396.

(5) [1928] 2 K. B. 588.

(6) (1865) 11 H. L. C. 443.

(7) [1893] A. C. 562.

(8) [1912] 1 K. B. 270.

(9) [1909] 1 K. B. 78.

(10) [1907] 1 K. B. 192.

(11) L. R. 7 C. P. 328.

to become a tenant he would not be willing to pay any rent to house machinery which was the property of the owner, and therefore the assessment of the hereditament for rating purposes must be nil. There would be no beneficial occupation of the premises because the benefits accrued to him as owner and not as occupier. Even if the owner who was in occupation of the premises were regarded as being the hypothetical tenant it would not make any difference, because in that case the existence of an hypothetical landlord must be assumed, and even such a tenant would not give any rent for the hereditament merely in order to preserve the hypothetical landlord's property. *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers* (2) have no application to the facts found in the present case, because when those cases are considered in the light of the conflicting language of the various reports it is clear that those cases were dealing only with chattels housed in the mill, and not with machinery which was itself a part of the hereditament.

[The following cases in addition were also cited: *Liverpool Corporation* v. *Chorley Union Assessment Committee* (3); *Monti* v. *Barnes* (4); *Holland* v. *Hodgson* (5); *Bain* v. *Brand* (6); *Sheffield and South Yorkshire Permanent Benefit Building Society* v. *Harrison* (7); *London County Council* v. *Hackney Borough Council* (8); *Poplar Assessment Committee* v. *Roberts* (9); *Tyne Boiler Works Co.* v. *Longbenton Overseers* (10); *Reg.* v. *Lee (Inhabitants)* (11); *Hellawell* v. *Eastwood* (12); *Reynolds* v. *Ashby & Sons* (13); *Crossley Brothers* v. *Lee* (14); *Hobson* v. *Gorringe* (15); *Boyd* v. *Shorrock* (16); *Chidley* v. *West Ham Churchwardens* (17); *Reg.* v. *London School*

(1) 5 B. & S. 505; 33 L. J. (M. C.) 178; 10 L. T. 606; 12 W. R. 911.

(2) 6 B. & S. 591; 34 L. J. (M. C.) 206; 13 W. R. 861.

(3) [1912] 1 K. B. 270, 287.

(4) [1901] 1 K. B. 205.

(5) L. R. 7 C. P. 328.

(6) (1876) 1 App. Cas. 762, 772.

(7) (1884) 15 Q. B. D. 358.

(8) [1928] 2 K. B. 588.

(9) [1922] 2 A. C. 93, 103.

(10) 18 Q. B. D. 81.

(11) (1866) L. R. 1 Q. B. 241.

(12) (1850) 6 Exch. 295.

(13) [1904] A. C. 466.

(14) [1908] 1 K. B. 86.

(15) [1897] 1 Ch. 182.

(16) L. R. 5 Eq. 72.

(17) 32 L. T. 486.

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Board (1); *London County Council* v. *Erith Churchwardens* (2); *Burton-upon-Trent Corporation* v. *Burton-upon-Trent Assessment Committee* (3); *London, Midland & Scottish Ry. Co.* v. *Assessor for Railways and Canals.* (4)]

Monckton K.C. replied.

Cur. adv. vult.

1935. Dec. 20. The following judgments were read :—

GREER L.J. The Townley Mill Company (1919), Ld., (hereinafter called "the company"), were, on April 1, 1933, the owners of a hereditament in Oldham which consisted of a cotton mill in Hanson Street, Oldham, which at the time they were not using for the purposes of a cotton mill, but were only using for the purpose of warehousing process machinery and loose chattels. The Assessment Committee had assessed the premises for rating purposes at the net annual value of 1437*l.*, and as they regarded the mill as an industrial hereditament entitled to reduction under the Derating Act they reduced the rateable value to 359*l.* The company went before the Assessment Committee and made to them a proposal for the amendment of the valuation list "(1.) By the separation and valuation as a separate hereditament of two rooms, comprising the whole of the warehouse in the basement of the mill, then let off and in the occupation of the Yorkshire Dyeing and Proofing Company, Ld. (2.) By the reduction of the net annual and rateable values of the mill to nil or nominal values." The Assessment Committee rejected the proposal except in so far as it dealt with No. 1, and they declined to reduce the net annual value of the mill to nil or nominal value. These proposals having been made by the company under the powers given in that behalf by s. 37 of the Rating and Valuation Act, 1925, the company, as provided by sub-s. 8 of that section, their proposal having been rejected and being aggrieved by that rejection, appealed to the quarter sessions against the Assessment Committee's

(1) (1886) 17 Q. B. D. 738.
(2) [1893] A. C. 562.
(3) (1889) 24 Q. B. D. 197.
(4) 1933 Sc. L. T. 462, 468.

refusal to accept the proposal. The only matter with which the quarter sessions were concerned was whether the Assessment Committee were right in rejecting the proposal. If the quarter sessions came to the conclusion that the Assessment Committee were right in rejecting the proposal it was unnecessary for them to give any decision as to the amount of the rateable value of the said hereditament. All they had to do was to decide whether or not the company's proposal was rightly rejected. They decided that it was, and stated a case for the opinion of the Court. Para. 9 of the case states in various sub-paragraphs the evidence with regard to the question they had to determine. Sub-para. 5 reads as follows: "A schedule of the plant, machinery, accessories and loose chattels in and on the premises on the 1st day of April, 1933, is contained in the company's Statement of Case (document numbered 4). The said schedule is arranged as follows: Category I.—Machinery and plant within section 24, sub-section 1 (*a*) of the Rating and Valuation Act, 1925. Category II.—Machinery and plant within section 24, sub-section 1 (*b*) of the Rating and Valuation Act, 1925. Sub-category A—Fixed machinery. Sub-category B—Loose accessories (all of which have been used in or on the various machines and which are interchangeable and essential parts). Sub-category C—Loose accessories to machinery and plant in Category I. and Category II., sub-category A, necessary for the working of the machinery and plant used in connection therewith. Category III.—Loose chattels." The machinery and plant in Category I. was conveniently referred to as motive machinery, and those in Category II. as process machinery.

Before April 1, 1933, the material date, that is to say the date at the beginning of the rating year, the company had entirely given up the working of the mill as a mill for the production of cotton, and they had left in charge of the hereditament an engineer, whose salary had been reduced from 6*l.* to 2*l.* 12*s.* 6*d.* per week. Sub-para. 29 of para. 9 states that "the hereditament was occupied by the company to some extent for the purpose of keeping the plant and machinery in repair and good condition," and sub-para. 30

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states that "it was of benefit to the company as owners of the building, plant and machinery that the plant and machinery should remain on the premises and be preserved from depreciation," and in sub-para. 31 it is stated that "the capital value of the loose chattels on the premises was very small and the rent which a hypothetical tenant would pay to store them would be insignificant."

For the purpose of the hearing of the appeal to the King's Bench Division and of this appeal it was agreed that the rent the hypothetical tenant would pay to store the loose chattels would be the sum of *7l.*

By sub-para. 33 it is stated that "at the hearing it was contended by the company and found by the Court that there was no beneficial occupation of the hereditament as a cotton mill," but the quarter sessions held that the company were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto, and loose chattels, and they therefore dismissed the appeal.

The question upon which the opinion of the Court was asked by the quarter sessions was whether upon the statement of facts contained in the case they came to a correct determination and decision in point of law, and if not what should be done in the premises.

On appeal to a Divisional Court of the King's Bench Division, it was decided that by reason of the express words of s. 24, sub-s. 1 (*b*), of the Act of 1925 no account could be taken of the presence of the process machinery as being warehoused in the hereditament. On appeal to this Court it was argued by the company that quite independently of that section no value could in rating law be found for the premises as premises in which the process machinery was being housed. The basis of this argument was that the process machinery was fixed machinery which while it was so fixed was part of the hereditament, and that no hypothetical tenant would be so hypothetical that he would be prepared to pay rent for the opportunity of housing property which ex hypothesi was not his property but was

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the property of the owner, and it was argued in the second place that in any event on the true construction of s. 24, sub-s. 1 (*b*), of the Act of 1925 if the hereditament would apart from that section have had a rateable value as a warehouse, the effect of that section was to provide that no account should be taken of the value of the process machinery which was being housed in the hereditament.

Before dealing in detail with some of the decisions that were cited, it seems to me that it would be useful to consider the general trend of the decisions on the subject of rateable value. The Parochial Assessments Act of 1836 by s. 1 defines "net annual value" as follows: "The rent at which the [hereditament] might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

By s. 15 of the Union Assessment Committee Act, 1862, "gross estimated rental" was defined as "the rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any."

The necessity for putting in the valuation list the gross estimated rental as well as the net rateable value gave rise to considerable technical difficulties from time to time, and it was decided in 1925 that it was desirable that only the rateable value should be estimated and put in the valuation list. This was brought about by the Rating Act of 1925. The test of rateable value is still that which was laid down in the Parochial Assessments Act, 1836, s. 1. If it was not obvious at the time that Act was passed it soon became obvious that there were grave difficulties in applying this test to various classes of hereditament. With regard to house property it was a comparatively simple matter to determine what the annual rental value was. This was done by calling witnesses who could out of their experience say what houses of the kind would probably let at from year to year, but even

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with regard to house property some difficulty was occasioned in applying the test to country mansions, which were hardly ever in practice let from year to year, and when Assessment Committees came to deal with other classes of property it was plain that they must find some method of rating those properties for which it is quite impossible to suppose that any tenant from year to year would give any rent at all. For example, hereditaments occupied by railway companies could not conceivably be let from year to year, and nobody who was not assured of some larger interest than a tenancy from year to year would pay any rent for them at all. A similar difficulty arose with regard to hereditaments on which manufacturing processes were carried on, because in this case also no tenant from year to year would agree to pay anything for them by reason of the insecurity of his tenure. Surveyors and others interested in making rating valuations had to find some method of ascertaining the rental value of such properties. In the case of railway companies' and similar properties they adopted what was called the profits method, that is to say, they ascertained the profits made out of the hereditament and then, after making allowance for tenant's capital, interest on it and reasonable profit to the tenant, they regarded the balance as representing the annual rental value notwithstanding the fact that it was quite clear that no tenant from year to year would pay that rent for the hereditament. In the case of factories they adopted the principle of ascertaining the capital invested in the undertaking and inferring that an owner who was willing to embark that capital in his undertaking would be willing to pay a rent based on the interest on that capital. It is clear in both cases that the rental value so arrived at was not the rent that a tenant from year to year would pay, because it was quite clear that no one would take the premises as tenant from year to year at the rent so estimated or at all. The rating authorities and the rating tribunals therefore departed from the strictness of the test laid down in the Parochial Assessments Act of 1836, and from time to time it was decided by the Courts that if the owner occupier of a hereditament was in beneficial occupation of it, that is to say, if his occupation was of value, then he was rateable at such amount as would represent the rental value attributable to his beneficial occupation. If this view had not been taken, the result might have been that large hereditaments enjoying the protection provided by local government would escape rateability altogether, and this would have had the unfortunate consequence of putting on the less valuable properties the whole burden of the rates.

I now proceed to deal with the authorities in so far as they affect the company's contentions.

There was an attractive simplicity about the argument presented by Mr. Tyldesley Jones for the company which at one period of his argument commended itself to me. It may be summarized thus: The test must always be, What rent would the hypothetical tenant be prepared to pay for the hereditament in the state in which it in fact was at the material date? What rent would he offer to pay for a building which contained landlord's fixtures and tenant's fixtures which, not having been removed, must be regarded as part of the hereditament for which a rent falls to be estimated under s. 1 of the Act of 1836? He then pointed out that the hypothetical tenant would not pay anything for the opportunity of housing the property of his landlord, and that therefore the rateable value could not be estimated on the basis of the mill being regarded as a warehouse for the process machinery temporarily fixed to the hereditament, as that would be making the hypothetical tenant pay something for housing that which was part of the hereditament. This argument would be unanswerable if logic be accepted as the deciding factor in fixing the rental value of premises which are not in the occupation of a tenant but are in the occupation of the owner, but by what Vaughan Williams L.J. in *Liverpool Corporation* v. *Chorley Union* (1) calls "judge-made law," the strict logical position has been departed from time after time in favour of rules of justice and convenience. The Courts were frequently called upon to decide what rateable value

(1) [1912] 1 K. B. 284.

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should be attached to hereditaments in the occupation of owners which contained what are usually called landlord's fixtures, tenant's fixtures, and movable machinery which were unfixed chattels, and by a long series of cases it was decided that these three classes of machinery should be taken into account as enhancing the rental value of the hereditament. These cases were finally considered by the House of Lords in *Kirby* v. *Hunslet Union Assessment Committee.* (1) There the House of Lords confirmed the many cases in which it had been decided that all such machinery should be taken into account as enhancing the rental value of the hereditament. In the course of his speech Lord Halsbury said (2): "It would have been, I should have thought, extremely difficult to arrive at the proper assessment of such things, because the business of human life is not conducted by putting an hypothesis of what a thing would fetch if it were occupied otherwise than as it is, and the problem which the overseers have to solve in arriving at the assessment is difficult enough, without putting the additional difficulty upon them, that they are to try and find out what a building would fetch in the shape of rent if it was different from what it is, or if it were used differently from what it is, or if it were furnished differently from what it is. It is enough, to my mind, to say that for a period of certainly more than half a century, erroneously according to the learned counsel who last addressed us, but undoubtedly in fact, judges of the greatest eminence have recognised the fact that although a particular set of machinery may, by reason of the peculiarity of the manufacture, or what not, be not affixed to the freehold so as to become part of the land, or hereditament, yet, if the thing is being so occupied, if the premises are being so employed, and the machinery in those premises is being so used as that it makes the factory appropriate to the particular industry carried on therein, the machinery itself is not to be disregarded in assessing the value of that thing occupied as it is, and used as it is, with the accommodation and furniture which is necessary for it to carry on the manufacture that is there

(1) [1906] A. C. 43.

(2) Ibid. 47.

being conducted." This decision is inconsistent with the logical view presented by the argument of Mr. Tyldesley Jones, because it regards the hypothetical tenant as ready to pay a rent based on the value of the machinery which at great expense he may have to place on the hereditament in order that he may make any profit out of it, but it was put by the Court as a rule of convenience having regard to the fact that the persons concerned with rating valuations could not be expected to act like lawyers and make distinctions between machines permanently fixed to a hereditament, and machines fixed as tenant's fixtures removable during the tenancy, and machines not fixed at all which were purely personal property. The decision was mainly based upon the undesirability of overruling decisions which had been made the basis of rating for more than half a century. The practical result of these decisions, as stated by Salter J. in *Smith & Sons (Motor Accessories), Ld.* v. *Willesden Union Assessment Committee* (1), is that the occupier of a hereditament like a factory must be rated upon what he would pay in rent for the factory with all its equipment, even though the equipment is something which he would usually in the ordinary course of business have to provide himself.

In 1864 it became necessary to determine whether the owners of a cotton mill, who had given up using it as a cotton mill and were only using it as a place to keep the machinery therein in a fit state for working when trade should revive, were rateable, and it was held that the occupiers were rateable for the mill, and that the rate should be made upon its annual value as a storehouse for the machinery in it, and not upon an estimate of the rent which might fairly be expected for it if let for a reasonable term of years. This decision seems to me quite inconsistent with the argument presented by Mr. Tyldesley Jones, because it is based upon allowing a rent to be attributable to the housing of machinery which in some instances was fixed to the floor of the mill and in other instances merely placed on the floor: see *Staley* v. *Castleton Overseers.* (2)

(1) 121 L. T. 244.

(2) 5 B. & S. 505, 506.

The facts are stated in the report as follows: "Accordingly, in January, 1862, the appellants finished the working of the cotton in the machinery and on hand at their works, and discharged all their workpeople excepting their foreman or steam engineer, whom, and whom alone, they had since employed on the premises, at a considerable reduction in his wages, for the purpose only of keeping the steam in the mill, and turning the engine and machinery for the purpose and in manner after mentioned: and since that time they have not had any goods whatever in the mill, nor did they ever work the same in any way excepting for the purpose of turning the machinery, and keeping the mill and machinery in repair and ready for use upon the revival of the cotton trade."

On these facts it was held that the owners were rateable on the mill as if it were a mere warehouse for storing machinery, which I understand as meaning all machinery in the mill, whether fixed or not. In such a case, if the strict test of s. 1 of the Act of 1836 was applied, the mill would have had no rateable value, as no tenant would be foolish enough to pay a rent for looking after the owners' machinery. The judges were relieved from the duty of ascertaining the rateable value of the mill, as on the above basis it had been agreed at 141*l*. In the course of his judgment Blackburn J. says (1): "If any parts of the machinery are so affixed to the building as to become part of it they are part of the soil as much as if they were built into it. If not, the fact of their being there, or of their capacity for being beneficially used, would affect the yearly value of the premises; for a tenant in estimating the rent which he would give would take those things into account."

In my judgment the decision was not confined to machinery which consists of chattels, but the Court regarded the mill as a warehouse for machinery which was usually a tenant's fixture removable during the term. The case was followed in *Harter* v. *Salford Overseers*. (2) The facts are, I think, correctly summarized in the headnote, and it seems to me

(1) 5 B. & S. 514.

(2) 6 B. & S. 591.

clear that the learned judges of the Queen's Bench held that the building had a rateable value not only as a warehouse of loose chattels, but as a warehouse for the machinery in it. In his judgment Blackburn J., after referring to the case of *Staley* v. *Castleton Overseers* (1), said (2): "When premises commonly let remain on hand and are empty it may be a good rough rule and may work well in practice not to rate them to the poor rate. But where the owner retains property in hand and gets some benefit from it, he is rateable to the extent of that benefit."

I think this statement of the law has been accepted ever since the case of *Harter* v. *Salford Overseers* (3) in 1865 as the rule of law applicable to all cases where the owner retains property in hand and gets some benefit from it. This rule has been developed in a number of cases in which beneficial occupation by the owner has been treated as a subject-matter for rating. I think Mr. Monckton was right in what he stated in his reply in this case, that once it is found that the owner is in occupation and is receiving a benefit from his occupation then he is rateable as beneficial occupier, and the extent of his rateability then falls to be determined by the fiction of an imaginary or hypothetical tenant from year to year. In actual fact no person asked to take the hereditament from year to year would agree to pay any rent for it because he would not have the certainty of being able to make any profit by an occupation limited to a tenancy from year to year. Our attention was called by Mr. Tyldesley Jones to certain other reports of this case (4), and of *Staley* v. *Castleton Overseers* (5), but I do not think they show in any way that the view above indicated as to what was decided is incorrect. In the report in the Weekly Reporter (6) Blackburn J. is reported as saying: "Where premises commonly letable are not let the practice is (and it is a practice which, working by a kind of rule of thumb,

(1) 5 B. & S. 505.

(2) 6 B. & S. 597.

(3) 6 B. & S. 591.

(4) 5 B. & S. 505; 33 L. J. (M. C.) 178; 10 L. T. 606; 12 W. R. 911.

(5) 6 B. & S. 591; 34 L. J. (M. C.) 206; 13 W. R. 861.

(6) 13 W. R. 862.

is substantially fair and convenient), to consider the premises empty, and not rateable for that year. But it does not follow that, when a man retains possession, and actually turns them to a beneficial use, such an occupation is not to be rated."

The Courts had soon to face the question what was to be done to ascertain the rateable value of premises or hereditaments for which no tenant from year to year could possibly be obtained: see *Jones* v. *Mersey Docks and Harbour Board* (1); *London County Council* v. *Churchwardens of the Parish of Erith.* (2) In these and many other cases it was laid down that the test of rateability in the case of owners in occupation is whether the occupation is of value, or to use the word more frequently applied, whether it is beneficial. A difficult case to apply this doctrine arose for decision in *Liverpool Corporation* v. *Chorley Union Assessment Committee.* (3) This case was concerned with the rateability of certain land used by the Liverpool Corporation as gathering ground for their waterworks at Rivington. In the course of his judgment Buckley L.J. says (4): "An owner who retains property in hand, and gets benefit from it, is rateable to the extent of that benefit (per Blackburn J. in *Harter* v. *Salford Overseers* (5)). The amount of the rate is controlled, no doubt, by the use to which the owner puts the land: *Rex* v. *St. Luke's Hospital.* (6) The property is rateable as it is, not as it might be made, but this is a consideration which goes not to rateability but to quantum of rate." He then discussed the question whether the Corporation were in occupation at all, a matter with which we are not concerned here, because it is quite plain that the company were in occupation of the mill by reason of the chattels that they kept there. Kennedy L.J. in the course of his judgment said (7): "I think that the facts show that the corporation has such a beneficial user of this land, and such an intention, for the purpose of enjoying and maintaining such

(1) 11 H. L. C. 443.
(2) [1893] A. C. 562.
(3) [1912] 1 K. B. 270.
(4) Ibid. 288.
(5) 6 B. & S. 591, 597.
(6) (1760) 2 Burr. 1053, 1064.
(7) [1912] 1 K. B. 292, 293.

user, of continuous control, enabling the corporation at their will to enter upon the land, and to deal with the land as it pleases, that the inference of rateable occupation is the proper inference. . . . . If beneficial user exists, and if beneficial user affords good ground for the inference of rateable occupation, it appears to me that the presence of artificial works cannot be essential to proof, but that, when it is proved, it strengthens of course the evidence of such occupation."

This case in the House of Lords (1) contains a very useful statement of the law by Lord Atkinson. In his speech he says (2): "The passage cited from page 14 of the report in *Winstanley's Case* (3), based as it was upon the judgments of Buller J. and Lord Herschell, had reference solely to the first of the three questions set forth at page 12 of that report, into which it was stated the question for decision resolved itself. These questions were (1.) (the bald question), 'Does the appellant occupy this cemetery for which he is rated?' (2.) 'If he does, is his occupation a thing of value?' (3.) 'What is the measure of that value?' It is quite obvious that, according to the authorities already cited, the appellant would not have been rateable if the second question were answered in the negative, though the first question were answered in the affirmative."

In the *Erith* case (4), in the course of his speech, Lord Herschell points out that the doctrine that lands occupied for public purposes are not rateable is exploded. He says (5): "It is I think rateable whenever its occupation is of value." Again he says (6): "Suppose some other system of sewage were adopted and the pumping station were no longer applied to its present use, I do not think it could be doubted that the London County Council would be rateable in respect of it, and that its rateable value would be at least the sum thus fixed. If so, I cannot think that it is exempt from rateability at the present time on account of the particular use to which it is put by the owner—a use which it is clear might be

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(1) [1913] A. C. 197.
(2) Ibid. 208.
(3) [1910] A. C. 7.
(4) [1893] A. C. 562.
(5) Ibid. 585.
(6) Ibid. 586.

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abandoned at any time if it were thought expedient to do so. No obligation was imposed upon the Metropolitan Board of Works, and none is imposed on the London County Council, of maintaining in existence any particular sewage work." Further (1): "Again, suppose premises of occupation value for agricultural purposes were to be adopted by the owner for use in connection with the manufacture of some article under a patent process, which he alone was licensed to use, and that in their then condition no person would be willing to take them, would the premises cease to be rateable or be assessable only at a nominal sum although they might be much more valuable to the owner and their occupation much more beneficial than if they had remained fit for agriculture and in a condition to be readily let for that purpose? I cannot think so. These are illustrations. Many others might be adduced pointing in the same direction, and to my mind conclusively showing that the object of the Legislature in enacting the provisions of the Statute of William IV., to which I have referred, would be defeated if the question what the owner would have given if the premises had been to let and he had been free to take them were discarded from consideration."

It seems to me unnecessary to refer to any one of the numerous cases in which beneficial occupation is treated as the test of rateability, but I may mention the most recent decision, that of Wright J., as he then was, in *London County Council* v. *Hackney Borough Council* (2), where the authorities were considered at length, and the learned judge reached the decision that in order to make a building rateable it had to be shown that its occupation was of value. The learned judge says (3): "The essentials to constitute rateability are thus stated by Lord Atkinson in *Liverpool Corporation* v. *Chorley Union Assessment Committee* (4): '(1.) Does the appellant occupy this cemetery'—that being the locus in question—'for which he is rated? (2.) If he does, is his occupation a thing of value?'" He decided in that case that the occupation was proved but that it was not rateable occupation because it was of no value.

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(1) [1893] A. C. 588.
(2) [1928] 2 K. B. 588.
(3) Ibid. 593.
(4) [1913] A. C. 197, 208.

The effect of the various decisions on the statutory liability of an occupier to be rated is emphatically stated by Lord Atkinson in *Poplar Assessment Committee* v. *Roberts* (1) in the passage cited by Mr. Monckton in his reply: "What the ratepayer is, under both the Act of 1836 and that of 1869, rated in respect of is decided by many cases in this House to be the beneficial occupation of a hereditament. And if he is in enjoyment of this species of occupation, he must be rated, even though he should not be a tenant of the hereditament, and though no person could be made the tenant of it, and though no rent is or could be received in respect of it." Then his Lordship points out that the statutory measure of the rateable value of the occupation is the annual rent which a tenant (i.e., an imaginary and hypothetical tenant) might be reasonably expected to pay one year with another for the hereditament as occupied. The effect of the cases is therefore that if an owner has been decided to be in beneficial occupation of premises which in fact no tenant from year to year could be found to take, he is rateable, and it is for the tribunal which has to decide the quantum of the benefit which is to be attributed to rent to determine that question, but that if there be benefit the rateability cannot be reduced to nil or a nominal amount.

The result of these numerous cases is to establish beyond question that the rateability of an owner in occupation of property turns entirely on the question whether his occupation is of value. There can be no doubt on the facts of the present case that the occupation by the company of the mill for the purpose of housing and keeping in order the mill machinery was an occupation that was beneficial or of value. Unless the statute of 1925 has made a difference in this respect, it seems to me clear on the authorities that the company were in rateable occupation of the mill, and that their beneficial occupation of the mill cannot be confined to their occupation of it for the purpose of housing the few chattels that were

(1) [1922] 2 A. C. 93, 107.

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there, but that the quarter sessions were entitled to take into account that they were in beneficial occupation in respect of the preservation of the process machinery pending either the sale or lease of the property, or the removal for sale of the process machinery. Before dealing with s. 24 I should like to add that even if I thought, as Scrutton L.J. seems to have thought in *Consett Iron Co., Ld.* v. *The Durham County Assessment Committee for the North Western Area* (1), that the decisions in *Staley* v. *Castleton Overseers* (2) and *Harter* v. *Salford Overseers* (3) were wrong, I should feel myself bound by them, inasmuch as for seventy-one years they have been acted upon by Assessment Committees and rating surveyors in fixing the rateable value of premises similar to the cotton mill we are considering in this case. However, I do not in fact think that they were wrong. I agree with the view expressed in the House of Lords in the *Consett* case (4), and do not agree with Scrutton L.J.'s view.

Mr. Tyldesley Jones naturally relied very strongly on the case of *Reg.* v. *Lee* (*Inhabitants*) (5), where it was decided that in estimating what share of the profits of the company should be taken to represent rent the tribunal were not entitled to allow to the occupier deductions in respect of trade fixtures such as pumps and exhausters fixed to the freehold but removable as tenant's fixtures. It seems to me that this decision is in line with the various cases which were ultimately approved by the House of Lords in the *Hunslet* case (6), and if s. 24 of the Act of 1925 effects an alteration of the law laid down in the *Hunslet* case (6) it will equally effect an alteration of the law laid down in *Reg.* v. *Lee* (*Inhabitants*). (5)

It only remains for me to determine what is the effect of s. 24, sub-s. 1 (*a*) and (*b*), of the Act of 1925. It is to be observed that by the long title of the Act it is described (inter alia) as an Act "to amend the law with respect to the valuation of machinery." I think one may assume that complaints had been made by occupiers of factories in which

(1) 46 Times L. R. 223, 226.
(2) 5 B. & S. 505.
(3) 6 B. & S. 591.
(4) [1931] A. C. 396.
(5) L. R. 1 Q. B. 241.
(6) [1906] A. C. 43.

machinery was used for the purposes of the business, that they were being rated for machinery which was not strictly speaking part of the hereditament, but which was machinery which any tenant would have to install as tenant's fixtures in order that he might carry on his business profitably. This seems to me to have been an injustice to this class of ratepayer, because it in effect rated him on plant he had to install for the purpose of making his occupation one of value to him. Sect. 24, sub-s. 1, of the Act is in the following words: " For the purpose of the making or revision of valuation lists under this Part of this Act, the following provisions shall have effect with respect to the valuation of any hereditament other than a hereditament the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein:—(*a*) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule to this Act shall be deemed to be a part of the hereditament: (*b*) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

It seems to be intended to set at rest for the future the debatable question as to what plant and machinery shall be deemed to be part of the hereditament, and what plant and machinery shall not be deemed to be part of the hereditament but on the contrary treated as tenant's property, by stating in the Schedule, for which the Report of a Committee was afterwards substituted, the description of the machinery and plant which is to be deemed part of the hereditament, and by excluding therefrom process machinery as something of which no account can be taken as being part of the hereditament. I think the object of s. 24 was to alter for the benefit of industrial ratepayers the law which was laid down in the series of cases which culminated in the *Hunslet* case (1), and that sub-s. 1 (*b*) ought not to be interpreted as meaning that where the owner is in beneficial occupation of a factory for the purpose of maintaining it in order that he may either resume work or sell the tenant's fixtures he is not

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(1) [1906] A. C. 43.

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to be deemed to be in beneficial occupation of the factory which he is occupying for the purpose of keeping his plant or machinery in good condition. If that had been intended I think the words of the sub-section would have been different from what they are. I agree that this question of the construction of s. 24, sub-s. 1 (*b*), is a difficult one, but I am satisfied that the intention of the section was not in any way to effect any alteration in the law as laid down in *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers*. (2)

For the above reasons in my judgment this appeal ought to be allowed with costs here and below, and the question in the case should be answered in the affirmative. It will then be for the Assessment Committee in the first instance to make an estimate of the rateable value of the premises as occupied by the company for the purpose of warehousing and keeping in order the process machinery together with the few chattels mentioned in the case.

Slesser L.J. In this case, stated by the Committee of quarter sessions appointed under the Rating and Valuation Act, 1925, for the opinion of the High Court, it has been found as a fact that a cotton mill known as the Townley Mill was occupied by the Townley Mill Company, Ld., to some extent for the purpose of keeping the plant and machinery in repair and good condition; that the whole of the plant and machinery was maintained in position, and that it was of benefit to the company as owners of the building, plant and machinery that the plant and machinery should remain on the premises and be preserved from depreciation and that there was no other user of the hereditament. There were also on the hereditament certain loose chattels the capital value of which was very small, and the rent which a hypothetical tenant would pay to store them insignificant. The Committee concluded that the company were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto, and loose chattels and that there was no beneficial occupation of the hereditament as a cotton mill. The further material facts of this case have been fully stated by Greer L.J.

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(1) 5 B. & S. 505.

(2) 6 B. & S. 591.

In my opinion, before the passing of s. 24 of the Rating and Valuation Act, 1925, this hereditament would have fallen to be rated in respect of its beneficial occupation as a warehouse for the machinery in accordance with the cases of *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers*. (2) In *Staley's* case Blackburn J. said (3): "Regarding the mill merely as a storehouse for valuable machinery which it is important to keep in a state fit for use, it is obviously property for which some persons would give a rent." In *Harter's* case (2), where the owner of a silk mill gave up business with the intention of never resuming it, the machinery, some of which was fixed to the floors and ceilings, being in the nature of tenant's fixtures, it was also held that the appellant was rateable for the mill, but only upon its annual value as a warehouse for the machinery in it. Cockburn C.J. said (4): "The present case is not distinguishable in principle from *Staley* v. *Overseers of Castleton*. (1) If there was in that case a beneficial occupation of the mill for the purpose of warehousing the machinery for working the mill, there is the same in the present. The only difference is that there the owner intended to resume the working of the mill when circumstances should render it expedient to do so: here the owner did not intend to resume the working of the mill as owner, but was waiting either to let the premises or sell them as soon as a tenant or a purchaser could be found." The other judges in that case spoke to the like effect. These cases were cited with approval by Buckley L.J. in *Liverpool Corporation* v. *Chorley Union Assessment Committee* (5) and by Kay J. in *Re Watson, Kipling, & Co.* (6) and, though Scrutton L.J. in the *Consett Iron Co.* case (7), seemed to doubt whether *Staley's* case (1) and *Harter's* case (2) were right, I am impressed by what was said by Cockburn C.J. in *Harter's* case (4)—namely, that: "It is expedient to adhere to a

(1) 5 B. & S. 505.
(2) 6 B. & S. 591.
(3) 5 B. & S. 515.
(4) 6 B. & S. 596.
(5) [1912] 1 K. B. 270, 288.
(6) (1883) 23 Ch. D. 500, 506.
(7) 46 Times L. R. 226.

decision given especially upon a question of rating." The position before the Act of 1925 has been examined at length in the judgments of my brothers in this Court and I need not repeat their views, with which I agree.

Despite the long establishment as authority of *Staley's* case (1) and *Harter's* case (2) Mr. Tyldesley Jones has argued that they are more limited than has been generally supposed and have no application to the facts found in the present case, and I propose to deal with that matter which he so fully discussed before us. In brief, his contention was this: that when the two earlier cases are fully considered, more especially in the light of the conflicting language in the various reports, it appears that those cases were dealing only with chattels housed in the mill and not with machinery which was itself a part of the hereditament. He cites, for example, Crompton J. in the report of *Harter's* case in the Weekly Reporter to the effect that (3): "Clearly the owner does get a benefit from keeping his chattels in the mill, for he must keep them somewhere, and by turning the mill to that account he saves himself the necessity of using and paying for some other warehouse." And in that case report of the in the Law Journal the same learned judge says (4): "Chattels are not rateable; but the machinery and tools must be kept somewhere, and by storing them in the mill the appellant saves the expense of keeping them elsewhere, and perhaps paying for warehouse room." And, as to *Staley's* case (1), he points out that Mr. Kay, for the respondents, argued (5) according to the report in the Weekly Reporter: "The machinery is not fixed so as to become a part of the thing rated."

It is his contention that on the facts in the present case the machinery, whether it be regarded as landlord's or tenant's fixtures, was a part of the premises. He relies upon the statement in the case that the machinery was fixed machinery or accessories thereto, interchangeable and essential or necessary for the working of the machinery and plant used in connection

(1) 5 B. & S. 505.
(2) 6 B. & S. 591.
(3) 13 W. R. 862.
(4) 34 L. J. (M. C.) 208.
(5) 12 W. R. 912.

therewith. As regards the accessories, he says that, when machines are affixed to the freehold, their essential parts, such as belts, only fit to be used as part of them, are parts of the freehold and pass by a grant of the freehold which carried with it the machinery and all essential parts: *Sheffield & South Yorkshire Permanent Benefit Building Society* v. *Harrison*, per Cotton L.J. (1), and for this purpose it matters not whether the fixtures are landlord's or tenant's fixtures. *Holland* v. *Hodgson*, per Blackburn J. (2), doubting *Hellawell* v. *Eastwood*. (3)

On this footing, the contention of Mr. Tyldesley Jones in substance amounts to this: that in so far as here the machinery was part of the freehold, it could not be the subject of warehousing, and that in any event no hypothetical tenant would pay to house property which was itself the property of the owner. But this view, in my opinion, is too subtle to meet the realities of the case. In the first place, I doubt very much, despite the use by certain judges of the word "chattels" in the earlier cases, whether it was ever intended to apply technical rules as to fixtures in *Staley's* case (4) and *Harter's* case: (5) I think the judges were speaking generally of machinery preserved in the building, whether such machinery was or was not in other aspects of law a part of the freehold. The exception from rating of the empty house, with which the machinery, regarded as fixtures, may be compared, is not to be extended (per Vaughan Williams L.J. in the *Liverpool Corporation* case (6)) and the obligation not to disregard the machinery, albeit not part of the freehold, as an enhancement of value (*Kirby* v. *Hunslet Union* (7)), are all against his presentation of the case, and I come to the conclusion, therefore, that apart from the Act of 1925 this mill, regarded as a warehouse, would have been rateable as such.

In this case the learned Lord Chief Justice declined to enter into a consideration of the earlier position and based his judgment on his view of the 1925 Act, which was, in substance, the only matter passed upon in the Court below. On a consideration of s. 24 of the 1925 Act, it is to be observed at the outset that, quoad manufacturing, a clear dichotomy is made in s. 24 between machinery of the class now generally spoken of as motive machinery and that of the class now generally spoken of as process machinery; but both equally might be in need of warehousing, and so far as s. 24 might be regarded as being intended by the Legislature to operate by way of relief of the owner or occupier of an operated factory, no relief in such a case as warehousing would appear to be necessary or logical, nor more necessary in the case of process than in the case of motive machinery. This argument from mischief is, of course, not conclusive, but if regard is paid solely to machinery actually in use in a mill, the purpose of the section becomes more evident. The law as it finally stood before the passing of the 1925 Act is to be found in *Kirby* v. *Hunslet Union*. (1) That case refused to make any distinction between machinery which would pass as a part of the freehold and machinery which would not so pass, and decided that tenant's machinery placed in a factory, and used therewith for the business of the factory, whether it be affixed to the freehold or not, may be taken into consideration in assessing the factory for rates. In the language of Lord Halsbury (2): "for a period of certainly more than half a century . . . . judges of the greatest eminence have recognised the fact that although a particular set of machinery may, by reason of the peculiarity of the manufacture, ... be not affixed to the freehold so as to become part of the land, or hereditament, yet, if the thing is being so occupied, if the premises are being so employed, and the machinery in those premises is being so used as that it makes the factory appropriate to the particular industry carried on therein, the machinery itself is not to be disregarded in assessing the value of that thing occupied as it is, and used as it is." And Lord Macnaghten added (3): "The point was settled more than fifty years ago."

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(1) 15 Q. B. D. 362.
(2) L. R. 7 C. P. 334.
(3) 6 Exch. 295.
(4) 5 B. & S. 505.
(5) 6 B. & S. 591.
(6) [1912] 1 K. B. 270, 284.
(7) [1906] A. C. 43.

(1) [1906] A. C. 43.
(2) Ibid. 47.
(3) Ibid. 50.

This inclusion of machinery which was to be taken into account in valuation was felt to be a burden. It was followed in *Smith* v. *Willesden Union* (1), and the obvious purpose of the present legislation in dividing machinery into two classes, the value of one of which is not to be taken into account in the valuation of the hereditament, and the other class which is, is to make a rough division between that which may fairly and normally by reason of its nature and manner of fixture be said to be a part of the hereditament and that which may not and to exclude the latter in valuation. When I pass to the consideration of the actual language of s. 24, it will be apparent how this has been brought about, but for the moment I am content to observe that the difference of treatment has not any obvious relation to the warehousing of machinery at all.

Having said this, I seek to see whether the language used is such that this division into motive and process machinery, a distinction appropriate to machinery in use, has in fact been made to apply by compulsion of language to the case of machinery permanently out of commission. In my view, when the language is closely examined, it has no such effect.

I begin my examination by quoting the first sub-section of s. 24, which is all that is needed to be considered for the present purpose. " 24 (1.) For the purpose of the making or revision of valuation lists under this Part of this Act, the following provisions shall have effect with respect to the valuation of any hereditament other than a hereditament the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein:— (*a*) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule to this Act shall be deemed to be a part of the hereditament: (*b*) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

In the first place, it is to be observed that para. (*a*) states that for the purpose of making or revision of valuation lists all such plant or machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule

(1) 89 L. J. (K. B.) 137.

to the Act, shall be deemed to be part of the hereditament. This Third Schedule to the Act has been modified by the Committee set up under sub-s. 3 of s. 24 of the Act by the Plant and Machinery (Valuation for Rating) Order, 1927, and includes a number of machines and plant, some of which are there said to be "used or intended to be used" for certain specified purposes. A similar phrase "used or intended to be used" appears in the Third Schedule itself, and they would appear to be inappropriate to warehoused immobile machines. But other difficulties arise in applying this sub-s. 1 (*a*) of s. 24 to warehoused motive machinery, for some of it, which may be chattels, thereby become notionally a part of the freehold, and so may increase the valuation of the hereditament—an understandable reason when machinery is in use but difficult to justify when its existence as part of the freehold is due only to the need for its warehousing—the result of which would be that in the case of motive machinery the warehouse would, in part, be warehousing itself, i.e., warehousing the chattels and fixtures which by para. (*a*) have become a part of it.

Para. (*b*) does not, in words, exclude any process machinery, which may or may not be a part of the freehold, from so continuing either as a part of the freehold or not, but says that no account shall be taken of the value of any such plant or machinery in or on the hereditament. This provision, in my view, operates to exclude from valuation, broadly, that active machinery which is not part of the freehold which might have otherwise been brought in under the *Hunslet* case (1), and deliberately avoids the difficult consideration of the rights of landlords and tenants, mortgagees or remaindermen against mortgagors or tenants for life in considering which machinery is or is not in fact part of the freehold. Instead, it avoids the difficulties by once and for all establishing a certain statutory definition of the class of machinery thought fit and that not thought fit to be relieved. Again it would seem to have no application to inert process machinery merely warehoused.

(1) [1906] A. C. 43.

Our attention was also called to the words in para. (*b*) "no account shall be taken of the value." These words are not very appropriate to the question of beneficial occupation as such, but have been used in connection with the valuation of the hereditament. They appear in the *Tyne Boiler Works Co.* case (1), per Lopes L.J., which is perhaps the leading case establishing that machinery and plant which are placed on premises used as a factory for the purpose of making them fit as premises for such a factory, are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remain personal property, and are not physically attached to the premises, and since that time they have been used as a convenient phrase in dealing with enhancement of the value of the hereditament in cases where machinery is to be used on the hereditament but is not part of the freehold. These words also, in my opinion, point to an intention of the Legislature to deal in the 1925 Act with such cases as the *Tyne Boiler Works Co.* case (2) and *Kirby* v. *Hunslet Union Assessment Committee* (3), but to leave the principle established by the warehousing cases, such as *Staley* (4) and *Harter* (5), unaffected by the remedial legislation.

For these and the other reasons stated by my Lords, with which I agree, I feel myself compelled to differ from the Divisional Court; I think that s. 24 of the 1925 Act has no application to the facts of the present case and that the Committee of quarter sessions were right, and that this appeal should be allowed.

SCOTT L.J. (read by SLESSER L.J.). This is a difficult as well as an important case. The question to be decided has been stated in the judgments of my brethren and I need not re-state it. My view of its scope will appear in the course of this judgment. In the Divisional Court, as appears from the judgment of the Lord Chief Justice, it was assumed that s. 24 of the Rating and Valuation Act, 1925, applied to the facts of

(1) 18 Q. B. D. 81, 95.
(2) Ibid. 81.
(3) [1906] A. C. 43.
(4) 5 B. & S. 505.
(5) 6 B. & S. 591.

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the case found by quarter sessions, and that the decision must turn on the correct interpretation of that section and on its application to those facts. On that basis the Court reached the conclusion of law, that by reason of the express prohibition contained in para. (*b*) of sub-s. 1 of the section the process plant and machinery must be wholly disregarded for purposes of valuation, and no account taken of the value to the owner-occupier of having them safely stored.

Whether it was right or wrong to assume that s. 24 was applicable is the first question in the appeal. If it was right, the second question is: Did the Divisional Court apply the section correctly to the facts of this case? If the assumption was wrong, the case must fall to be decided by applying to it the relevant statutory provisions outside that section, to be found partly in the same Act, partly also in earlier statutes, such as the Act of Elizabeth. The third question in the appeal and the most difficult is this; it is really whether the hypothetical tenant measure of value expressed in s. 68 of the Act of 1925 makes it legally impossible on the facts of the case to attribute to the occupation of this building by the owner-occupier any annual value at all for rating purposes. I ignore the figure of 7*l*. per annum agreed between the parties as the annual value of the building for warehousing the few loose chattels there were in it, as the parties desired a decision on the main question of principle.

Mr. Tyldesley Jones for the company, the respondents in this Court, contended before us that s. 24 of the 1925 Act concluded the case in his favour, as had been held by the Divisional Court; but he also contended that if he was wrong on that contention, he was still entitled to hold the judgment of the Divisional Court on the grounds that even apart from s. 24 of the 1925 Act the mill possessed no annual value, since the whole of the plant and machinery, process as well as motive, was affixed to and had become part of the hereditament and that no hypothetical tenant would pay a rent for a mill and machinery the property of another, which had been closed down because the prevailing conditions of trade made it commercially impossible to work them, and that the safe warehousing of his landlord's machinery could be of no interest to the tenant. Accordingly, on this ground also he argued it was equally impossible in law to assign any annual value at all to the company's occupation of the building. He also contended (and this is the fourth question in the case) that there was no evidence to support the finding of quarter sessions that the company was in "beneficial occupation" of the hereditament in respect of which it was assessed and rated. In my view this last contention is manifestly erroneous; but his third contention undoubtedly raises a very difficult question on account of the peculiar language of the statutory test of the hypothetical tenant.

The particular facts which give rise to the problems which we have to decide can be extracted shortly from the findings contained in the special case, which are binding on us so far as they are consistent with all the other facts found. The hereditament for the occupation of which the company was assessed had previously been worked as a cotton mill, but at the time of assessment it was a cotton mill out of use, put, so to speak, with its contents into safe storage pending the return of better times in the cotton trade. The company kept an engineer on the premises and continued in occupation in order that the valuable, intricate and delicate machinery of the mill might be preserved in perfect condition, ready to be restarted if commercial prosperity returned to the cotton trade and made it good business to reopen, in the interest either of its present owner, the company, or of some purchaser or tenant obtainable in the future. During this waiting period the mill was in fact not a cotton mill, it was just a building without motive power, full of elaborate machinery, doubtless of large capital value when installed, and still potentially of substantial capital value on the chance of its being again used for manufacturing. The machinery was classified by agreement between the parties, as stated in the special case, into certain categories of which there were in substance two classes (the third being irrelevant for our purposes): (A) Motive and other kinds of plant and machinery of the kinds described in the Third Schedule to the 1925 Act (and later

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in the statutory list substituted for that Schedule at a subsequent date by order of the Secretary of State; see the Plant & Machinery (Valuation for Rating) Order 1927, (at p. 1094 of the 6th ed. of Ryde on Rating); (B) Process plant and machinery, i.e., mules and a multitude of other pieces of plant and machinery used in the process of manufacturing. The third class was negligible, consisting of the few loose chattels above mentioned, which are to be disregarded in this appeal. The case itself does not find clearly what proportion of the process machinery in class (B) was affixed to the freehold, but for the purpose of the main decisions in the appeal I assume that quarter sessions regarded this class generally as being tenant's fixtures which as between landlord and tenant could be removed by the tenant during the tenancy, but unless so removed were and would remain part of the hereditament. It is this landlord and tenant point on which the company chiefly relied in arguing the third question and which makes that question so difficult.

I will now deal with the four questions in order. In my view s. 24 of the Act of 1925 has no application to this case. The fact that the building was once a working factory and may still be called in popular language "a Cotton Mill" is not enough to bring it within the section; nor does it make any difference that there is still there all the plant and machinery which was formerly installed for the purposes of working, and was once regularly operated. They remain in the building simply for safe custody and preservation, with a view to the possibility of the mill being again operated at some future date, sufficiently distant not to come within the field of vision of the current rating assessment. My reasons are as follows. In the first place the language of the section is as a whole addressed to the particular mischief which Parliament in 1925 was setting out to redress. The rule laid down in the line of cases ending in *Kirby* v. *Hunslet Union Assessment Committee* (1) and *Smith* v. *Willesden Union* (2) was regarded by manufacturers as imposing an unfairly heavy burden of rates upon them, and the intention of

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(1) [1906] A. C. 43.

(2) 89 L. J. (K. B.) 137.

Parliament was undoubtedly to relieve the manufacturers of a part of the burden. The account given at p. 231 of the 6th ed. of Ryde on Rating may be accepted as historically accurate for the purposes of the present case. I see no indication in the section, or in the Third Schedule to the Act, or anywhere else in the Act, of any intention of Parliament that the provisions of the section, ex hypothesi appropriate to a factory or mill in work, should be applied to a factory or mill deliberately put out of commission for an undefined period of time. On the contrary, not only is the general scheme of the section appropriate only to factories and mills in use, or intended to be put into use during what I will call the assessment period, but in the Third Schedule the language of each one of the four heads obviously contemplates industrial premises in active use. The Statement, substituted by order of the Secretary of State for the Third Schedule to the Act pursuant to s. 24, sub-s. 5, which is printed on pp. 1094–8 of Ryde on Rating (6th ed.), cannot be invoked so as to alter the meaning of the Act itself, but it had, by the terms of that sub-section, become incorporated in the Act before the time of the proceedings in this particular assessment, and in my view the detailed descriptions in that statement all presuppose active operation of the factory, and are all addressed to the rating of a factory as a going concern. The long title of the Act stating that it is an Act (inter alia) " to amend the law with respect to the valuation of machinery," also tends to show that the section had the object to which I have referred above—namely, the remedying of a grievance which manufacturers felt had resulted from the decisions above referred to. Indeed the language of sub-s. 1 (*a*) and (*b*) has been taken from the judgments in the *Tyne Boiler Works Co.* case (1), as was pointed out to us by Mr. Monckton.

There is a further reason pointing to the same conclusion. The case of factories out of use, where the machinery which they contained was in point of fact being warehoused for safety in situ without removing it, had often come up for consideration previously and occasionally reached the High

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(1) 18 Q. B. D. 89, 95.

Court. The decisions in *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers* (2) were given in the years 1864 and 1865. They were for years and years before 1925 very well known decisions, quoted in books on rating, regularly applied. They were notorious to all interested in the rating of factories both in and out of use when Parliament passed the Act of 1925. The principle of stare decisis made it appropriate to maintain such long-recognized authorities in rating law, unless they were plainly wrong or for reasons of policy it was desired to have the rules they laid down altered by Parliament. There is no express reference to them anywhere in the Act—not even in s. 24. Nor can an intention to overrule them be implied from its terms. That section, as I have already said, was intended to redress the specific grievance which manufacturers felt from the rule in *Kirby* v. *Hunslet Union*. (3) But they only felt the grievance in the case of factories, etc., in work, to which alone the rule had been applied by the decisions, and the language of sub-s. 1 (*a*) and (*b*) is plainly apposite for the redressing or at least the pecuniary mitigation of that particular grievance, because it is largely extracted from the cases which imposed the rule. Had it been intended to modify the rules of law laid down in *Staley* v. *Castleton Overseers* (1) and *Harter* v. *Salford Overseers* (2) it would have been easy to say so in perfectly unequivocal language, but that was not done. But the reasoning does not rest only upon grounds of first impression in the interpretation of the section, for there have been decisions since 1925 which in spite of s. 24 treat *Staley* (1) and *Harter* (2) as still good law: see *London County Council* v. *Hackney Borough Council*, per Wright J. (4), and *Consett Iron Co., Ld.* v. *Assessment Committee for No. 5 or North-Western Area of County of Durham* (5), in which Lord Dunedin (6) and Lord Warrington of Clyffe (7) expressly approved both decisions. The effect of the decisions in *Staley's* case (1) and *Harter's* case (2) was to say that in the case of a factory intentionally put out of commission for the prospective period of an assessment, where the building is used for the valuable purpose of warehousing the process machinery, and the resultant benefit is enjoyed by the occupier, whether owner or lessee, the value of that beneficial occupation is properly taken into account in arriving at the annual value of the hereditament for rating purposes. I cannot believe that in the circumstances attending upon the legislation in 1925, and the notoriety of those well known decisions, it could have been the intention of Parliament in s. 24, sub-s. 1 (*b*), to deal with anything but active factories. To suppose that Parliament intended by language appropriate to active factories to repeal the law laid down by the cases as to dormant factories without using plain language to give effect to such an intention is, to my mind, contrary to sound principles of statutory interpretation.

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(1) 5 B. & S. 505.

(2) 6 B. & S. 591.

(3) [1906] A. C. 43.

(4) [1928] 2 K. B. 588, 598.

(5) [1931] A. C. 396.

(6) Ibid. 411.

(7) Ibid. 412.

This conclusion does not involve any such difficulty as might have arisen had it been possible to argue against it that such an interpretation of s. 24 would involve the startling corollary that the 1925 Act had made no provision at all for the rating of factories out of commission; for in my view the Act makes full provision for that purpose. It divides all buildings into two classes: "houses and buildings" in general on the one hand, factories and other industrial hereditaments, as a special class of buildings, on the other: see s. 22, sub-s. 1, the Second Schedule, Part 1, col. 1, and especially the statutory "note" appended to that Part of that Schedule. The note makes it clear, in my view, that the second class consists of live factories—factories which are in fact in use, and not of dead factories—factories which have been put out of use for an indefinite period. A factory out of use is, I think, merely "a building" within the general class of "houses and buildings" and is to be valued on ordinary principles without regard to the special provisions of s. 24. I reach the conclusion therefore which I stated at the outset, that s. 24 does not touch the present problem.

The second question in this appeal is more difficult than the first. The relevant facts as found by quarter sessions may be shortly stated. There was no dispute between the parties as to the fact of occupation by the company as owners of the mill; the company admitted occupation. This admission was obviously right in law, as they had exclusive possession in circumstances which necessarily made their possession "occupation" within the meaning of the Statute of Elizabeth. Quarter sessions also found as a fact in para. 14 of the special case that the occupation of the company was "beneficial" in that the process plant and machinery was safely warehoused in the building. The company thereby clearly enjoyed the valuable advantage of having machinery and plant which they owned left undisturbed in situ and also kept in safe custody, so that it would be ready for use whenever trade permitted the reopening of the mill, free of expense in the meantime. Having regard to the findings of fact in para. 9 and in particular sub-paras. 26 to 30 of that paragraph, and also to the rival contentions stated in paras. 11 and 12, I have no doubt that the meaning which I have above attributed to para. 14 is the true meaning of the paragraph. The legal effect of such beneficial occupation is necessarily to impose upon the company, as occupiers, liability within the Statute of Elizabeth, the substantive enactment which imposed and still imposes rating liability—unless there is to be found some later statute which in clear terms takes it away. The common-sense view of the position of the owner of a mill in the circumstances found in the special case is plainly that his occupation is valuable and that therefore he is rateable within the principle of the Statute of Elizabeth. But the company contend that the definition of gross value in s. 68 of the Act of 1925 does give them immunity, basing their contention on the ground that the statutory device of the hypothetical tenant for assessing quantum makes it impossible to conceive of any rent at all being paid for the premises by that mysterious personage. If, they argue, the machinery for quantifying the liability by reference to the hypothetical tenant which was invented by Parliament in 1836, and has been repeated in subsequent rating Acts, necessarily yields a figure of zero, that result negatives the liability which would otherwise attach. They reach this conclusion by the following argument: "As between landlord and tenant the whole of the process machinery and plant was, on the facts of this case, affixed to, and therefore in law a part of the hereditament of which the landlord is the owner. If any benefit of pecuniary value accrues from the safe preservation of the mechanical parts of the hereditament that benefit is enjoyed by the landlord and not by the hypothetical tenant who gains nothing by it, and therefore would pay no rent for it. If you apply the statutory hypothesis of an imaginary tenant from year to year, with logical completeness, as you must, you cannot regard the inactive mill as a warehouse for its machinery, and the element of warehouse value disappears. The hypothetical tenant in occupation of the hereditament would get no benefit from his occupation because the machinery is a part of that very hereditament which on the statutory hypothesis would be let to him; there being no inducement in trade prospects to become a tenant, the rent he would pay would be nil and therefore the rating assessment must be nil. Although we admit that the owner is in occupation, we contend that his occupation is not in a rating sense beneficial because the benefits accrue to him as owner, not as occupier; alternatively even if the safe preservation of his machinery is, as the quarter sessions found, of real value to him as occupier within the Statute of Elizabeth, there is no means of enforcing against him the obligation imposed by the Statute of Elizabeth upon all occupiers, since the statutory device for measuring the quantum of that obligation necessarily produces in his case the figure zero."

This paradoxical result is not in my view either intended or produced by the statutory device for assessing quantum. The Statute of Elizabeth imposes a substantive obligation upon all occupiers to contribute according to the annual value of their occupation, and it is not right to construe a secondary or subordinate provision such as the computation of annual value so as to negative or cut down the primary and predominant enactment unless that intention is made unequivocally clear. In my view the various statutory

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enactments of the provision for assessing quantum by supposing an imaginary tenant in occupation passed from 1836 onwards are to be regarded as secondary or subordinate legislation when contrasted with the primary and predominant enactment in the Statute of Elizabeth, which created the obligation of occupiers. The relevant principle of statute interpretation applicable to such a problem of *liability* is, I think, identical with that which has been applied to solve the problem of an apparent inconsistency between a statutory provision creating a new *right* and some other provision of the statutory code prescribing the method of its quantitative assessment. It is immaterial whether the primary provision is one creating a right or one imposing an obligation. The case of a newly created right was considered in the House of Lords in *Lyson* v. *Andrew Knowles & Sons, Ld.* (1) The Workmen's Compensation Act, 1897, created the right to compensation. The Schedule assessed the compensation by reference to the workman's " average weekly earnings "—both for weekly payments in case of injury and for lump sum payments in case of death. The Court of Appeal held (2) that a " casual " workman, being necessarily employed for less than two weeks, could not have " average weekly earnings " and was therefore outside the Act of 1897 altogether. The House of Lords reversed the decision on the ground that such an Act must be construed so as to give effect to its " affirmative " or " leading " or " substantive " or " primary " provisions (see per Lord Halsbury (3) and per Lord Davey (4)), and not to allow secondary provisions to cut down the substantive right—by reducing the class of beneficiaries intended by the primary provision. Lord Davey (5) said of the words in s. 1 of the Act " liable to pay compensation in accordance with the First Schedule to this Act " " it is an expression of the mode and scale on which the amount of compensation is to be ascertained ; the *amount* of compensation, not the right to it, is to be ascertained, and of the conditions

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(1) [1901] A. C. 79.
(2) [1900] 1 Q. B. 780.
(3) [1901] A. C. 85–86.
(4) Ibid. 95–97.
(5) Ibid. 96.

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upon which, when it is ascertained, it is to be enjoyed" ; and "Now, my Lords, if it were intended to restrict the compensation given by the Act to workmen engaged at least two weeks by the same employer, you would expect to find it in the Act, and you would expect to find it as a qualification of the right given by the Act ; you would expect to find it in some way limiting or qualifying the description of workman who is to be entitled to compensation. But you find nothing there at all, and even if I came to the conclusion that the construction put by the Court of Appeal on the schedule was the right one, I should say that this was a casus omissus which had been overlooked in framing the schedule, and that the right being given by the statute, there was nothing in the schedule to take away the right, and that the Court must find some other means of arriving at the amount and conditions upon which it was to be enjoyed so far as the schedule was inapplicable to the case."

The principle of *Lyson's* case (1) was again applied by the House of Lords in *Ball* v. *William Hunt & Sons, Ld.* (2) : see per Lord Macnaghten (3) and per Lord Atkinson. (4) I cannot think that Parliament in passing s. 1 of the Parochial Assessments Act, 1836, were intending to cut down the obligation imposed by the Act of Elizabeth. This is the more unlikely as that section was passed not to introduce any new principle of rating, "but to affirm that which had been already established by decisions of this Court"—namely, the Court of Queen's Bench : see per Lord Denman C.J. in *Reg.* v. *Lumsdaine.* (5)

If persons "are occupiers of property from which they derive a benefit, they are rateable," per Bayley J. in *R.* v. *Green* (6), quoted by Lord Atkinson in *Poplar Assessment Committee* v. *Roberts.* (7) The hypothetical tenant test is in truth mere machinery for ascertaining the value to the occupier, as was contended by the present Talbot J. as counsel in the *Poplar* case (1); indeed, the whole of his argument in that case is germane to the questions of principle raised by the present case, and is in my opinion a clear and sound statement of the law. Where the literal application of the wording of the hypothetical tenant test prevents the application of the fundamental principle of the Statute of Elizabeth, that the occupier of a hereditament must equally with other inhabitants pay on the basis of the value to him of the hereditament which he occupies, the statutory device for measuring value must be pro tanto disregarded. This principle of statute interpretation is in truth illustrated by the decisions that the occupying owner may himself be regarded as the imaginary tenant: such as in *Reg.* v. *London School Board* (2) and in *London County Council* v. *Erith Churchwardens.* (3)

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(1) [1901] A. C. 79.
(2) [1912] A. C. 496.
(3) Ibid. 500–1.
(4) Ibid. 501–6.
(5) (1839) 10 A. & E. 157, 160.
(6) (1829) 9 B. & C. 203, 207.
(7) [1922] 2 A. C. 93, 113.

In the *London School Board* case (4), it was argued that the owner could not be the imaginary tenant of the statute; the Court held that he could; but Lord Esher added (5): "If by the terms of any statute it [the School Board] could not legally be tenant it would be excluded from the calculation": and this view, based on the literal application of the statutory test, became the ratio decidendi of the Court of Appeal in *Owen's College* v. *Overseers of Chorlton-upon-Medlock.* (6) But the House of Lords in the *Erith* case (3) rejected it, Lord Herschell L.C. pointing out (7) that the exegetic words about the tenant which follow the words "annual value" in s. 1 of the Act of 1836 "only provide a means of arriving at what is the annual value of the premises," and added (8): "It seems to me that a contrary conclusion ought not to be arrived at unless the provisions of the statute inexorably require it." Only eight years after the Act of 1836 was passed Lord Denman C.J. in *Reg.* v. *Grand Junction Ry. Co.* (9) had expressed the above principle in substance when he said: "although the supposition is, that a tenancy is to be made,

(1) [1922] 2 A. C. 96.
(2) 17 Q. B. D. 738.
(3) [1893] A. C. 562.
(4) 17 Q. B. D. 739.
(5) Ibid. 740.
(6) (1887) 18 Q. B. D. 403.
(7) [1893] A. C. 595.
(8) Ibid. 596.
(9) (1844) 13 L. J. (M. C.) 94, 104; 4 Q. B. 18.

yet what the incidents of the tenancy must be, as to the actual terms of allowances, must be determined for the purpose of fixing the amount of the rate by the actual state of things; for this supposition of a tenancy is only a mode of ascertaining the existing value of the occupation to the existing occupier." So also had Cockburn C.J. said in *R.* v. *Fletton Overseers* (1) in 1861. "The true principle, according to which the value of the occupation to the hypothetical tenant contemplated by the Parochial Assessment Act is to be estimated, is, to assume the continuance of those circumstances which constitute the value to the existing occupier, unless it be made to appear that those circumstances are about to undergo a change."

The function of rating valuation is to ascertain the value to the existing occupier, because that is the basis of comparative liability between himself and other occupiers; the hypothesis of the imaginary tenant is intended to help and not to hinder the just enforcement of the primary obligation: if it hinders, it must be pro tanto treated as inapplicable.

In the present case it is precisely that position which is brought about if Mr. Tyldesley Jones' argument is allowed to succeed. The Act of Elizabeth imposes the liability to pay according to the annual value of the hereditament occupied. The sessions have found the obvious fact that the occupation here was valuable to the company. But Mr. Tyldesley Jones with perfect logic argues (1.) that all the plant and machinery must at common law be regarded as part of the hereditament and therefore the property of the landlord; (2.) that no *outside* tenant could be found to pay any rent whatever—merely in order to preserve his landlord's property; (3.) that to imagine the occupying owner as himself the tenant would not make any difference, as even he would not give any rent for the hereditament merely in order to preserve the hypothetical landlord's property.

From this argument the conclusion follows inevitably that however valuable the occupation may be to the company, the statutory aid to the assessment of quantum renders the company wholly immune from liability. This seems to me a reductio ad absurdum which in the words of Lord Herschell "the statutory provision does not inexorably require." It may be avoided, wholly by applying the principle of *Lyson* v. *Knowles* (1), or partially to the extent of value due to the process plant and machinery by supposing that the owner as hypothetical tenant first detaches all the tenant's fixtures and then pays a warehouse rent for the building in order to preserve in it his own plant and machinery. This partial way out of the difficulty does not touch the element of value to the occupying owner which arises from the use of the building for the preservation of the motive and other fixed machinery; but that question is not raised by the special case, which is limited to the question of process plant and machinery, and it is not necessary to discuss it. The inaptness of the hypothetical tenant test to the facts of the present case discloses what in reality may be a casus omissus in s. 1 of the Act of 1836 and the subsequent enactments which perpetuate the test. But be that as it may, as a device for measuring value it fails in a case like the present to act as a measure at all, and therefore should not be used.

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(1) (1861) 30 L. J. (M. C.) 89, 94–5; 3 E. & E. 450.

In regard to the fourth question it is enough to say that on the facts found in the special case there was in my judgment ample evidence to justify the finding of fact that the company was in beneficial occupation. In my judgment, the question asked in the special case must be answered in the affirmative. The appeal accordingly should be allowed with costs here and below, and the answer remitted to the sessions.

Appeal allowed. (2)

Solicitors for Assessment Committee: *Gibson & Weldon, for Megson & Nicholson, Oldham.*

Solicitors for company: *Gregory, Rowcliffe & Co., for John Taylor & Co., Blackburn and Manchester.*

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(1) [1901] A. C. 79.

(2) Leave to appeal to the House of Lords was given to the company.

R. F. S.

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Revenue—Income Tax—Income from foreign possessions—Beneficiary's directions for voluntary payments to her children—Payments made in the United Kingdom—Beneficiary "entitled" to that part of Income—Assessability to income tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Case V., r.* 2; *Miscellaneous Rules applicable to Sch. D, r.* 1.

Mrs. T., who died on February 1, 1933, was a beneficiary under the will of a testator who gave two-eighths of his residuary estate to a Trust Company of New York upon trust for investment and to collect the income thereof and after deducting legal charges and commission to accumulate the income until Mrs. T. attained the age of twenty-one years and afterwards upon trust to collect the income of the two-eighth shares and the accumulations and after deducting lawful charges and commissions to apply the net income quarterly or as often as the same should from time to time accrue to the use of Mrs. T. as long as she lived. The trusts of the will fell to be administered under the law of the State of New York, under which the whole estate in law and equity in the trust funds was vested in the Trust Company and the trust gave the beneficiary merely the right to resort to a Court of equity to compel the Trust Company to discharge the task imposed upon it. Accordingly, following *Archer Shee* v. *Garland* [1931] A. C. 212, the assessments on Mrs. T.'s income were made as regards this property under r. 2 of Case V. of Sch. D to the Income Tax Act, 1918, in respect of only the amounts of income received in or remitted to the United Kingdom.

Mrs. T. from time to time directed the Trust Company to pay certain allowances to her children. These allowances were all remitted to England either to the children or their bankers and were included in the assessments to income tax made upon Mrs. T. for the years 1924–25 to 1926–27 inclusive. On an appeal by her executors against the assessments:—

Held, by the Court of Appeal (affirming the decision of Singleton J., but on a different ground), that the drafts sent to the United Kingdom in respect of the allowances did not become the children's property until they had been cashed and that, although Mrs. T. could not be said to have received the payments, she was "entitled" to the income when it reached England and was therefore assessable to income tax in respect of it under r. 1 of the Miscellaneous Rules applicable to Sch. D when read in connection with r. 2 of the Rules applicable to Case V. of Sch. D.

APPEAL from the decision of Singleton J. on a Case stated

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under the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts.

The following statement of facts is substantially taken from the special Case.

At a meeting of the Commissioners held on November 3, 1933, the executors of Mrs. Katharine L. Timpson (hereinafter called "the executors") appealed against assessments to income tax for the years ending April 5, 1925, 1926 and 1927, made upon Mrs. Timpson before her death on February 1, 1933, under Case V. of Sch. D to the Income Tax Act, 1918, in respect of income arising from certain foreign possessions.

The late Mrs. Timpson, whose maiden name was Livingston, was the granddaughter of Mr. John W. Hamersley, of New York, who died on June 7, 1889. Under his will Mrs. Timpson was entitled to the income for life of two-eighth shares of his residuary personal estate. By clause 8 of the will the testator directed his trustees to divide his residuary personal estate into eight parts or shares "and to allot the respective shares either in the actual then existing investments or otherwise to or to the use of the respective persons hereinafter mentioned, that is to say,— . . . . and as to the remaining two-eighth shares (or one-fourth) of the personal estate in this section of my will first mentioned, I give and bequeath the same and direct my executors to transfer and deliver them to the said New York Life Insurance and Trust Company, upon trust for my granddaughter Catharine L. Livingston, daughter of my deceased daughter Catharine, and to hold and keep the same safely invested as hereinafter mentioned, and to collect and receive the income thereof, and after deducting legal charges and commissions" to accumulate the income thereof until the said Catharine L. Livingston attained the age of twenty-one years "and upon further trust after she shall have attained the full age of twenty-one years to collect and receive the full income of the said accumulated fund (consisting of the last-mentioned two-eighth shares and their accumulations) and after deducting lawful charges and commissions to apply the net amount of such income quarterly or as often as the same shall from time to time accrue to

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the use of my said granddaughter so long as she shall live, and upon her decease the said accumulated fund shall go and I do give the same to her then surviving lawful issue if any and in equal shares if all be of equal degrees of consanguinity to her but otherwise per stirpes."

The trusts of the will fall to be administered under the law of the State of New York. Under that law the whole estate in law and in equity to the trust funds is vested in the Trust Company, and the trust gives to the beneficiary merely the right to resort to a Court of equity to compel the Trust Company to discharge the task imposed upon it, which was to apply the net income of Mrs. Timpson's share of the residue to her use during her life.

Accordingly, following the decision in *Archer Shee* v. *Garland* (1), the assessments under appeal were made under r. 2 of Case V. of Sch. D in respect of only the amounts of income received in or remitted to the United Kingdom.

Mrs. Timpson had several children, one of whom, Mr. Theodore L. Timpson, was resident out of the United Kingdom. Mrs. Timpson, being desirous of making certain allowances to her children, from time to time by writing under her hand authorized and directed the Trust Company to pay various quarterly allowances to these children, and agreed that the amounts so paid should be good and proper charges against the income derived from her share of the estate, as though the amounts had been paid to her upon her receipt. The allowance to Mr. Theodore L. Timpson was remitted by the Trust Company to the credit of Mr. Timpson's banking account in the United Kingdom, and the allowances to the other children were also remitted to the United Kingdom to a bank or to an agent on behalf of the children or to the child direct, as the case might be. The amount of all these remittances was included in the assessments made upon Mrs. Timpson for the years 1924–25 to 1926–27 inclusive.

The only question now arising in this case was whether the amounts of these allowances formed part of Mrs. Timpson's income for the purposes of assessment to income tax.

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(1) [1931] A. C. 212; 15 Tax Cas. 693.

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It was contended on behalf of the executors that the allowances paid to Mrs. Timpson's children were income alienated in New York, and when remitted to the United Kingdom were not Mrs. Timpson's income. It was contended on behalf of the Crown that the assessments made upon Mrs. Timpson in respect of the remittances to the United Kingdom on account of the allowances to her children were correctly made and should be confirmed.

The facts in regard to the method in which the instructions to pay quarterly sums to the children were carried into effect (as set out in a supplemental statement of facts) are stated in the judgment of the Master of the Rolls.

The Commissioners held that the allowances to Mrs. Timpson's children remained her income, and as they were remitted to the United Kingdom were assessable to income tax upon her.

Singleton J. said that the decision in this case depended on whether or not the sums received by Mrs. Timpson's children within the years in question could be said to be "actual sums annually received in the United Kingdom" by Mrs. Timpson within the meaning of r. 2 of the Rules applicable to Case V. of Sch. D. The Solicitor-General said that these gifts were virtually in the same position as payments would be if made by the Trust Company to Mrs. Timpson's baker or butcher or butler, and that the position then would clearly be that they were actual sums annually received in the United Kingdom by Mrs. Timpson. Mr. Scrimgeour agrees that if the payments to the butler or butcher would be taxable income in the hands of Mrs. Timpson so too must the gifts be. But he (his Lordship) thought there was a distinction, and that though r. 2 would be sufficient to bring the payments to the butler or butcher within the income of Mrs. Timpson received in this country for that purpose, the position was not quite the same in the case of gifts made to children; and if the case had rested there he would have felt bound to come to the conclusion that he could not support the Special Commissioners' decision. But the Special Commissioners had considered the matter on wider grounds by reference to the procedure adopted to make the remittances.

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The argument of the Solicitor-General in regard to this part of the case was that in no case was there a completed gift until any draft sent to this country was cashed. In support of that argument he cited *In re Swinburne. Sutton* v. *Featherley.* (1) That decision of the Court of Appeal established that a gift of money was not completed by the mere handing over of a cheque. The same must apply in the case of each of these drafts. It followed that the money only passed to the donee in each case when the draft was cashed in this country. If so, the gift was a gift in this country and not in New York or elsewhere, and therefore the person who made the gift must be taken to have received the money in this country. It followed from this that tax was payable on the amounts of the gifts as actual sums annually received by Mrs. Timpson in the United Kingdom. He did not think that any distinction could be said to exist between the period prior to the amalgamation of the Trust Company with the Bank of New York and the subsequent period. The appeal against the decision of the Commissioners must therefore be dismissed.

The executors appealed. The appeal was heard on December 10 and 11, 1935, and January 15 and 16, 1936, and judgment was given on January 31, 1936.

Kenelm Preedy and *J. S. Scrimgeour* for the appellant. The allowances made by Mrs. Timpson to her children and forwarded by drafts to England ceased to be her property in New York and that part of her income was therefore not received by her in the United Kingdom so as to be assessable to tax under r. 2 of the Rules applicable to Case V. of Sch. D. Singleton J. was wrong in thinking that the gifts to the children were only completed when the drafts were cashed in this country. He ought not to have treated the gifts by Mrs. Timpson as gifts of money. Under the law of the State of New York all that Mrs. Timpson possessed was a chose in action, and all she could do therefore in order to make the allowances was to transfer part of it to her children. *In re Swinburne* (1) has no application to such a case. The direction to the Trust Company to pay sums to the children operated as an equitable assignment of part of the chose in action. It may be that until the direction was acted upon by the Trust Company it was merely a revocable mandate, but when the Trust Company acted on it and obtained drafts in sterling for transmission to the children in England, there was a complete equitable assignment: *Harding* v. *Harding* (1); *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (2)

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(1) [1926] Ch. 38.

[GREENE L.J. In Lewin on Trusts (13th ed.), p. 67, *Harding* v. *Harding* (1) is regarded as a case where a direction was given to existing trustees to hold property on new trusts instead of appointing new trustees.]

The test has always been whether the transferor has done everything in his power to effect a transfer.

[ROMER L.J. If a man purports to make an assignment, the Court cannot treat him as creating a trust. There must be evidence of an intention to create a trust: *Richards* v. *Delbridge.* (3)]

Here it is contended that there was a perfected equitable assignment when the Trust Company acted on the mandate, as Mrs. Timpson had done all she could to effect a transfer: see *Kekewich* v. *Manning.* (4) An equitable assignment can be validly made without consideration, and in such a case it is only revocable until it has been acted upon. What constitutes an equitable assignment depends on the particular property and to what act equivalent to assignment it is susceptible. When dealing with a right to receive income from trustees for life, all that can be done is to direct the trustees to give effect to the proposed dealing with the property, and when this direction has been acted upon the assignment is complete. The equitable assignment here was at latest completed when the letter sending the drafts to the donee was posted in New York: *Alexander* v. *Steinhardt Walker & Co.* (5) It is immaterial that the assignment was of part only of the yearly income: *Durham Brothers* v. *Robertson.* (6)

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(1) (1886) 17 Q. B. D. 442.
(2) [1905] A. C. 454.
(3) (1874) L. R. 18 Eq. 11.
(4) (1851) 1 D. M. & G. 176.
(5) [1903] 2 K. B. 208.
(6) [1898] 1 Q. B. 765.

An alternative view is that the letter from Mrs. Timpson to the Trust Company created a trust in favour of the children: *Bridge* v. *Bridge* (1), a case that accords with *Harding* v. *Harding.* (2) There cannot be a better declaration of trust than a direction to trustees to pay sums to specified persons.

[GREENE L.J. referred to Withers on Reversions (2nd ed.), p. 363.]

When once Mrs. Timpson's direction to pay allowances to her children had been given effect to by the trustees by obtaining sterling drafts, that part of the trust income was no longer under her control, and she could not revoke the direction without the consent of the trustees, as they had acted on the direction and incurred liability in doing so: *Seymour* v. *Bridge.* (3) There was a completed contract between Mrs. Timpson and the trustees which could only be set aside with their consent. It cannot therefore be said that when the drafts reached England they came into Mrs. Timpson's possession or power or were received by her. As regards the period after the merger of the Trust Company and the bank the position did not materially differ from the position before then. Under r. 1 of the Miscellaneous Rules applicable to Sch. D, tax under the Schedule had to be paid by the person receiving or entitled to the income. Mrs. Timpson neither received nor was entitled to the allowances when they reached this country. Even if the children could have been divested of these sums, they would then have revested in the trustees, and a new direction by Mrs. Timpson as to their application would have been necessary. On its true construction r. 2 of the Rules applicable to Case V. only imposes tax in respect of the sums received by the taxpayer in this country.

Sir Donald Somervell S.-G. and *R. P. Hills* for the respondent. A sum received in the United Kingdom in respect of the income from a foreign possession on the direction of the taxpayer either to extinguish a liability of his or to effect some other payment is assessable to income tax as part of the taxpayer's income. The fact that the money goes direct

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(1) (1852) 16 Beav. 315.
(2) 17 Q. B. D. 442.
(3) (1885) 14 Q. B. D. 460.

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to his creditor does not prevent its being his income received in this country within r. 2 of the Rules applicable to Case V. That was accepted in the Court below in regard to a payment to a creditor. It would be far too narrow a construction of the rule to hold that a payment effected by the direction of the taxpayer in this country is not sufficient to make that part of the income assessable to tax just as if it had been received by the taxpayer and then applied by him in making the payment.

There are no words in r. 2 to say that the taxable income must be received by the taxpayer himself. Further, there is no difference in principle between a direct payment to extinguish a legal liability and a payment for any other purpose so long as it is made by the taxpayer's direction. The money when arriving in England need not be under the taxpayer's control. It is sufficient that he should not have divested himself of the source of income: see *Drummond* v. *Collins.* (1) There is nothing in r. 2 to justify a distinction between voluntary payments and payments to creditors out of the income of foreign possessions. The whole question under r. 2 is whether the income is " received " in this country. And the alternative of " value " received is inserted to show that even if the income of a foreign possession is not imported but applied abroad in buying something which is sent to this country, that is sufficient to make the income assessable to tax: see *Inland Revenue Commissioners* v. *Paterson* (2) and *Gresham Life Assurance Society* v. *Styles.* (3)

On the question whether there was an irrevocable equitable assignment before the allowances for Mrs. Timpson's children reached this country, it is contended that the transaction was not an assignment and bears no resemblance to one. Mrs. Timpson's letters show no intention to make an assignment. That involves a dealing between assignor and assignee, and there was no communication with the alleged assignees until they each received a cheque or draft and none by the alleged assignor at any time. That is sufficient to negative or at any rate to present a formidable obstacle to the view that there was an equitable assignment. Mrs. Timpson neither informed the trustees of her intention to assign nor communicated with her children. The payments to them could have been effected either by assignments to them or by authorizing the trustees to make remittances. The latter is the more usual method and was that adopted here. The transaction here was of the same kind as when a banker's order is given directing a bank to make payments. It is immaterial that the payments were made here by trustees. Again an equitable assignment of money or property in futuro must be made for valuable consideration. Here Mrs. Timpson's letters gave directions as to dealing with future income, and on this ground also there was no equitable assignment such as has been suggested. Reliance has been placed on *Harding* v. *Harding* (1), but the case rested on the fact that a direction had been given to trustees to which they assented so as to constitute a new trust. There is no ground for saying that a trust was created here.

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(1) (1915) 6 Tax Cas. 525, 541. (2) (1924) 9 Tax Cas. 163, 178. (3) [1892] A. C. 309, 315.

[ROMER L.J. In point of fact no one can say that the remittances to Mrs. Timpson's children were "received" by her. Is it sufficient that she was still entitled to them when they reached this country?]

The money sent was Mrs. Timpson's income sent by her agents in the form of negotiable instruments. It was only when these instruments were cashed by the respective children that the money became the children's property.

[ROMER L.J. referred to r. 1 of the Miscellaneous Rules applicable to Sch. D.]

Even if Mrs. Timpson cannot be said to have "received" the money she was clearly entitled to it, and that was sufficient under r. 1 of the Miscellaneous Rules.

J. S. Scrimgeour replied.

Cur. adv. vult.

1936. Jan. 31. LORD WRIGHT M.R. This is an appeal from a judgment of Singleton J., who confirmed the decision of the Special Commissioners of Income Tax; it raises a question of some importance and nicety under r. 2 of the Rules applicable to Case V. of Sch. D of the Income Tax Act, 1918, as read with r. 1 of the Miscellaneous Rules applicable to Sch. D. The question is under what circumstances income from a foreign possession is chargeable to tax having been received in the United Kingdom.

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(1) 17 Q. B. D. 442.

The appellants are the executors of the late Mrs. Timpson, who was beneficially entitled to a life interest in certain proportions of the net income of a trust fund created under her grandfather's will: the trust fund was in New York State, and the trusts of the will fall to be administered under the law of that State: that law is found in these terms in the special case " Under that law the whole estate in law and in equity in the trust funds is vested in the trust company, and the trust gives to the beneficiary merely the right to resort to a Court of equity to compel the trust company to discharge the task imposed upon it, which was to apply the net income of Mrs. Timpson's share of the residue to her use during her life." The Special Commissioners applied to that finding the decision of the House of Lords in *Archer Shee* v. *Garland* (1), which held that in the case of such a trust fund assessment could not be made under r. 1 but could only be made under r. 2, which is in the following terms: " The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I., without any deduction or abatement other than is therein allowed." The three years' average in r. 2 as it originally stood was changed by s. 29 of the Finance Act, 1926, and one year was substituted.

(1) [1931] A. C. 212.

The decision in *Garland's* case (1) did not, however, throw any light on the main question at issue in this case, namely on what sums in such a case the tax is to be computed.

It is necessary first to summarize the facts. The terms of the will itself need not be quoted beyond stating that the trust in favour of Mrs. Timpson was to apply the net amount of the income of the specified fund after deducting lawful charges and commissions quarterly or as often as the same should from time to time accrue, to the use of Mrs. Timpson, during her life : the trust, as the law of New York State has been, as above stated, found by the Special Commissioners, was not a discretionary trust : accordingly as and when the net income accrued due, she was entitled to have that net income applied to her use : though she had no right in any of the specific property constituting the trust fund, the net income was subject to her disposition ; the words " to her use " must in the absence of evidence of the New York law on this point, be construed as having the same meaning as in English law ; she had the sole beneficial interest, and accordingly the trustees were bound to obey her instructions. The net income as and when it accrued and was ascertained was thus her income.

Mrs. Timpson, who was at all material times resident in England, in exercise of these powers instructed the trustees to make certain payments by way of allowances to her three children in the United Kingdom. The trustees were up to September, 1922, The New York Life Insurance and Trust Company. In September, 1922, they became merged by amalgamation in the Bank of New York and Trust Company, who thereafter became and continued the trustees. The business of the latter company included a banking department, so that they were able to make remittances to the United Kingdom by drawing upon their London correspondents.

The first instructions given by Mrs. Timpson to the trustees were dated February, 1921, and were in the following terms : " New York Life Insurance and Trust Company, 52, Wall Street, New York City. Dear Sirs, I hereby request and direct that out of the income derived from the estate held by the New York Life Insurance and Trust Company in trust for my benefit under the Will of John W. Hamersley deceased, the following sums be paid to the respective parties:—200*l.* per annum to Theodore L. Timpson. 130*l.* per annum to Robert Timpson. 130*l.* per annum to Katharine Timpson, my daughter, in quarterly payments, the first payment to be made on March 25, 1921, and I hereby agree that all amounts so paid shall be good and proper charges against the aforesaid income as though said amounts had been paid to me upon my receipt. And I request and direct that the foregoing payments shall continue to be made until otherwise directed by me in writing. Very truly yours, Katharine L. Timpson."

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(1) [1931] A. C. 212.

Subsequent instructions to the same effect but for increased amounts were given to the Bank of New York and Trust Company, on May 12, 1923, and again on February 27, 1925, and May 18, 1926.

Before September, 1922, the trustees carried out these instructions by obtaining from the Agents Bank of Montreal in New York a sight draft in sterling drawn on the Bank of Montreal in London for the appropriate amount payable to the child in question. A letter was then posted either to the child or the child's bankers in England, enclosing the draft. After the merger in 1922, the new trustees from time to time drew sight drafts in sterling for the appropriate amounts on their London correspondents, payable to the respective children; these they posted in due course in New York, to the child or the child's bankers as before. On each occasion when they did so, the trustees debited Mrs. Timpson's account with the proper sum in dollars. There is no evidence of any intimation being made direct by Mrs. Timpson to her children in respect of any of the drafts. It is not stated but must be assumed that the letters enclosing the drafts severally reached their addresses and that the drafts were cashed in ordinary course.

The amount of the remittances which fell within the period from March, 1922, to September, 1926, were included in the assessments made on Mrs. Timpson for the years 1924–25, 1925–26 inclusive. The question is whether they were rightly so included. On this the Commissioners held: "that the allowances to Mrs. Timpson's children remained her income, and as they were remitted to the United Kingdom were assessable to income tax upon her." This holding has been affirmed by Singleton J.

It is convenient in the first place to analyse the legal effect of these transactions. Each remittance was a voluntary allowance or gift, with the consequence that the donee only acquired the remittance when the gift was perfected. No distinction was drawn by the appellants, indeed any distinction was expressly disclaimed between the drafts before the merger and the drafts after the merger. I accordingly discuss only the latter, in which the trustees were drawers. It is clear that at any time before the drafts were cashed the trustees could countermand payment, and hence there was no completed gift until payment, just as much as in the case of a cheque there is no completed gift, at least inter vivos, of the money until the cheque is cashed.

No doubt when the draft reached the child there was a completed gift of the piece of paper, but that paper had only a nominal value unless and until the money was collected by, or credited to, the child. Hence until that was done the money represented by the cheque remained the income of Mrs. Timpson, that is, income to which she was beneficially entitled under the trust and as such arrived in England and was received by the child or his or her agent. It was, however, disputed by the appellants that this was true on the facts of this case, and the objections were put on two grounds. First it was said that the property passed to the child when the letter containing the draft was posted in New York: reliance was placed in support of this contention on a decision of Bigham J. in *Alexander* v. *Steinhardt Walker & Co.* (1). I should desire, if it were necessary, to have an opportunity of reconsidering that decision, but if it is rightly decided on its facts I do not think it would cover a case like those in question of voluntary gifts where the sending of the remittance is the

(1) [1903] 2 K. B. 208.

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spontaneous act of the sender and no communication, so far as is known, reaches the donee until the letter actually comes to the child. A case like the present is obviously different from one in which there is the acceptance by post of an offer, carrying with it an authority to accept by the act of posting a letter ; it is quite impossible in the present case to say that the Post Office was the agent of the addressee : that can never be so (if it is ever true) where, as here, there was no authority from the addressee to the sender to post the remittance, where indeed the posting was voluntary, gratuitous and unannounced. Hence, in my opinion, property even in the draft as a piece of paper did not pass to the child till it was received in England.

But it was further said that what was done in New York constituted an assignment of each remittance, so that the property in the remittance passed in America and the money was never received as Mrs. Timpson's money in England: it was also said that a trust was created by the same facts with the same consequence. I cannot accept either view. On the first point whether there was an assignment created by drawing and posting the draft, it is perhaps enough to say that there was no communication to the assignee until the draft arrived in England: communication from assignor to assignee either directly or indirectly is a necessary condition of an assignment and here there was nothing of that sort either mediately or immediately. But I do not put my conclusion merely on that ground. Lord Macnaghten said in classic language in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1): "But, says the Lord Chief Justice, 'the document does not, on the face of it, purport to be an assignment nor use the language of an assignment.' An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person.

(1) [1905] A. C. 454, 462.

If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor."

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Here, in my opinion, there is no evidence of intention to assign at all. What happened was that Mrs. Timpson being minded to make the remittance in each case, so instructed the trustees, who carried out these instructions, as they were bound under the trust to do, and did so in the ordinary course of business by drawing a draft and sending it to the recipient. I cannot see how it can properly be said in a simple case like this that instructions to draw and remit a cheque constitute an assignment of money. All that happened was that a mandate to remit was given by Mrs. Timpson to her trustees who were bankers, who proceeded to carry it out in accordance with usual banking practice. The trustees were in equity bound to obey that mandate, but the remittance was gratuitous and the mandate could have been withdrawn if Mrs. Timpson so directed her trustees, who would have been bound to cancel the authority to pay contained in the draft if the withdrawal was notified in due time, so that notice countermanding payment could be given to the drawees before they accepted or paid. In that event the relative amount would be re-credited to Mrs. Timpson in the trust accounts less any expenses properly incurred by the trustees. I think the argument that there was an assignment of the remittance in New York, and that, therefore, the money was never received in England as Mrs. Timpson's money, fails. Equally I am of opinion that the idea of a trust of the remittance is foreign to the nature of a commonplace banking transaction performed in the usual way to remit funds from one country to another and to a payee in the latter. To constitute a trust pro tanto of Mrs. Timpson's equitable interest in her income there must have been evidence of intention to create such a trust: see *Richards* v. *Delbridge*. (1) I can find no evidence of any such intention or expression of it.

The learned judge held on this view of the facts that the

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(1) L. R. 18 Eq. 11, 14.

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money was received in England by Mrs. Timpson and accordingly was taxable under the above mentioned r. 2. With all respect, I do not feel able to concur in that view. I do not think that it was received by her within the meaning of the rule. So far as she was concerned, she did not intend to receive it in England or to control it in England in any way. If payment was to be countermanded before the gift was complete, that could not be done by her but by the trustees, though no doubt in doing so they would be acting on her request. If that had happened, the remittance as such would not have been available to her in England. The debit in the trustees' books in New York would have been cancelled, and the relevant amount less expenses, if any, would have been restored to the trust account in New York for her beneficial interest. If the child had got the money, Mrs. Timpson would have had no control over it. She would never have had any beneficial property in it in England; it would not even have been credited to her in the same sense as a remittance would be if it had been sent to a tailor or a grocer to discharge a debt or to acquire a thing of value. I do not, therefore, think that these payments were actual sums from her income which were received by her in the United Kingdom. Indeed the whole purpose of the transaction was that the remittance should not be received by her, but be received by the child as donee. It had been assumed that r. 2 related to actual sums received in the United Kingdom by Mrs. Timpson, but Romer L.J. during the course of the argument made an entirely new suggestion, and we have had the benefit of argument on that point by counsel on both sides.

Romer L.J. pointed out that r. 2 of the Rules applicable to Case V. did not in terms say that the actual sums received in the United Kingdom must be received by the taxpayer or indeed specify by whom: he further pointed out that r. 1 of the Miscellaneous Rules applicable to Sch. D must be read with r. 2 of the Rules applicable to Case V., and that in r. 1 is to be found a definition of the persons on whom tax under Sch. D is to be charged; they are defined as being " the persons . . . . receiving or entitled to the income " in respect of which the tax is directed to be charged. It follows, as he pointed out, that if the sums in question were received in the United Kingdom as the income of Mrs. Timpson she was chargeable to tax as being the person entitled to it when it came into the United Kingdom, though in fact she never received it herself.

I respectfully agree with this way of looking at the question. The tax under r. 2 is a tax on Mrs. Timpson's income, and I am prepared to assume for the purposes of this case that the tax is limited to a computation based on actual sums received as her income in the United Kingdom : on that assumption I am of opinion, if it comes here as her income, that the fact that on arrival it is applied, in accordance with her directions, in payment to others, does not affect its chargeability to her. I assume that the particular part of her income must not have been alienated by assignment or trust away from her before the actual sum was remitted to the United Kingdom. But that, as already explained, is not true in this case. In fact it came in equity and in the way I have stated as her income ; however she chose to apply it, whether to payment of debts or in purchase of valuable things or services or as a voluntary allowance, it was income of hers to which she was entitled. Actual receipt by her would, I think, be too narrow a condition of chargeability : no one would doubt that she should in fairness be charged where the income was applied in the country to the discharge of debts or the acquirement of valuable things or interests, but I find it difficult to bring such payments any more than gratuitous payments like the payments in question within the charging rule, if that rule is limited to cases where there is actual receipt in this country by the taxpayer personally. But the test that the taxpayer should be entitled to the income (provided, as I here assume, that it comes as her income) whether she actually receives it or not, appears to me to be in accordance both with the language and the intent of the rules. Rule 1 of the Miscellaneous Rules applies to all cases under Sch. D and is aptly framed, and, I think, effective, to charge all income of

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the taxpayer, though the taxpayer never handles it himself because he applies the income before it reaches him, so that he never actually receives it, though he disposes of it. What r. 2 of the Rules applicable to Case V., read with r. 1 of the Miscellaneous Rules, requires is that the actual sums of the taxpayer's income should at least come to this country, under such circumstances that the taxpayer, if he does not actually receive them, is entitled to them, and these conditions were fulfilled in the present case. I reserve for further consideration, in case the question should ever arise, the question whether if income accrues abroad either qua legal estate or qua equitable estate to a taxpayer resident in this country, r. 2 of the Rules applicable to Case V. and r. 1 of the Miscellaneous Rules would make the taxpayer liable to charge, even though the taxpayer disposed of his interest in that income before it was received in the United Kingdom, so long as the actual sums of that income were in fact received by the alienee in this country.

I agree with the result arrived at by the Commissioners and the judge, though perhaps not entirely for the same reasons.

The appeal will be dismissed with costs.

ROMER L.J. Under Case V. in cl. 2 of Sch. D to the Income Tax Act, 1918, income arising from possessions out of the United Kingdom is chargeable to income tax. Rule 1 of the Miscellaneous Rules applicable to that Schedule provides that such tax shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in question. Rules 1 and 2 of the Rules applicable to Case V. show how the tax is to be computed. The former of those two rules applies to income arising from stocks and shares or rents in any place out of the United Kingdom. The latter applies to income arising from all other possessions out of the United Kingdom. In view of the finding of fact in the third paragraph of the special case, the tax on income to which Mrs. Timpson was entitled in any year of assessment under the will of Mr. J. W. Hamersley falls to be computed

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under r. 2 in accordance with the decision of the House of Lords in *Archer Shee* v. *Garland.* (1)

Under that rule tax for each of the years of assessment ending April 5, 1925, 1926 and 1927, respectively had to be computed on the full amount of the actual sums received in the United Kingdom from amongst other things remittances payable in the United Kingdom on an average of the three years preceding the year of assessment. The rule does not require that the sum should have been received by the person entitled to the income. In computing the tax, therefore, sums paid to third parties for the benefit, or at the request of, the party so entitled have to be taken into account ; and this is only what one would expect. For sums thus paid out of a person's income form part of his income for the purpose of the Income Tax Acts. See *Drummond* v. *Collins.* (2)

The only question, therefore, that falls to be determined on this appeal is whether the sums paid to each of the children of Mrs. Timpson in pursuance of the requests made by her to the American trustees were paid out of her income, or whether they were paid out of the income of that child. Now, they were, without any question, paid out of Mrs. Timpson's income if before the payments were made the children had not become entitled in equity to demand from the trustees payment of those sums. That it was competent for Mrs. Timpson to dispose of her equitable interest in the net income from time to time in the hands of the trustees cannot be doubted. It was held by them in trust to dispose of it for her use, that is to say in trust for her absolutely. She could, therefore, dispose of her equitable interest in whole or in part, whether with or without consideration, and whether in favour of a child or other relative or a complete stranger. Should she do so, the equitable interest of the income so disposed of would vest in the person in whose favour the disposition was made. It becomes, therefore, necessary to ascertain whether the letters which were addressed by Mrs. Timpson to her trustees, and which are set out in the appendix to the special case, operated to vest in the children

(1) [1931] A. C. 212.

(2) 6 Tax Cas. 525, 541.

respectively an equitable interest in the net income in the hands of the trustees to the extent mentioned in those letters. If they did, the remittances made by the trustees to each of the children in this country in pursuance of the letters formed part of the income of that child. If they did not, the remittances never ceased to be income of Mrs. Timpson. For she alone could dispose of her equitable interest in the income—the trustees had no power to do so—and it is not suggested that except by the letters she herself ever made any such disposition.

Now the equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four different ways. The person entitled to it (1.) can assign it to the third party directly; (2.) can direct the trustees to hold the property in trust for the third party (see per Sargant J. in *In re Chrimes* (1)); (3.) can contract for valuable consideration to assign the equitable interest to him; or (4.) can declare himself to be a trustee for him of such interest. In the present case the last two methods may be disregarded. For if the letters could possibly be regarded as constituting a contract between Mrs. Timpson and the children mentioned in them—and obviously they cannot—there was no consideration for such contract. Nor is it possible to maintain that Mrs. Timpson by the letters constituted herself a trustee of any part of her income for any of her children. "For a man to make himself a trustee", said Sir George Jessel M.R. in *Richards* v. *Delbridge* (2), "there must be an expression of intention to become a trustee." "It is true", he had said in an earlier part of his judgment, "he need not use the words 'I declare myself a trustee' but he must do something which is equivalent to it, and use expressions which have that meaning." In *Milroy* v. *Lord* (3) Turner L.J., after referring to two methods of making a voluntary settlement valid, namely, by assignment or declaration of trust, added: "The cases I think go further to this extent, that if the settlement is

(1) [1917] 1 Ch. 36.

(2) L. R. 18 Eq. 11, 15.

(3) (1862) 4 D. F. & J. 264, 274.

intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." Sir George Jessel, in *Richards* v. *Delbridge* (1), said that that sentence contained the whole law on the subject. Unless, therefore, the letters constituted an assignment to the children respectively of the equitable interest of Mrs. Timpson in the net income to the extent therein mentioned, by one of the first two methods to which I have referred, no equitable interest in the income ever passed to them.

It is true that in order to effect an assignment of an equitable interest no particular form of words is necessary so long as the intention to assign is made clear. In *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (2) Lord Macnaghten, after stating that an equitable assignment does not always purport to be an assignment or use the language of an assignment, said in relation to the equitable assignment of a debt: "It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor."

But no document can effect an assignment of an equitable interest unless it results in a vesting of the interest in the assignee, so that after notice of it is given to the trustee the latter becomes a trustee of the interest for the assignee. If then the letter of February 28, 1921, to take one of them as an example, constituted an assignment to Theodore L. Timpson of the sum of 200*l*. a year out of Mrs. Timpson's

(1) L. R. 18 Eq. 11, 15. (2) [1905] A. C. 454, 462.

income until she should otherwise direct in writing, then, unless and until she otherwise directed, Theodore L. Timpson would have had a right in equity to compel the trustees to pay him 200*l*. a year out of the net income in their hands. In my opinion he acquired no such right. I regard the letters as no more than revocable mandates given to the trustees, and conferring no rights whatsoever upon Mrs. Timpson's children. There was no valuable consideration given by the children nor were the letters ever communicated to them by anybody. The mandates were, therefore, revocable at all times material to the present case. It was, indeed, suggested in argument on behalf of the appellants that the mandates became irrevocable after the trustees had incurred expense towards carrying them into effect. This is, in my opinion, an untenable proposition. Mrs. Timpson could no doubt have been called upon by the trustees to indemnify them in respect of any expense or liability incurred by them in acting upon the mandates. But the children acquired no rights by reason of the trustees having incurred expense or liability, and nothing done by the trustees could deprive Mrs. Timpson of her right as against the children of revoking the mandates whenever she thought fit to do so. In my opinion, the sums paid to Mrs. Timpson's children were paid out of her income and not out of the income of those children.

I only desire to add this. If Mrs. Timpson by her letters disposed in favour of her children of any part of her equitable interest in the income, she had the power without the consent of any other person by virtue of those dispositions to obtain for herself the beneficial enjoyment of it. It would seem, therefore, that the income so disposed of must be deemed for the purpose of the enactments relating to income tax to be her income, by reason of the provisions of s. 20 of the Finance Act, 1922. For these reasons I am of opinion that this appeal fails, and must be dismissed with costs.

Greene L.J. Rule 2 of the Rules applicable to Case V. of Sch. D to the Income Tax Act, 1918, provides that: "the tax in respect of income arising from possessions out of the

United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom" from the sources mentioned "on an average of the three preceding years as directed in Case I." By s. 29 of the Finance Act, 1926, the income of the year preceding the year of assessment is substituted for the three years' average.

Under these provisions the subject-matter of taxation is not the amount received in the United Kingdom but the "income arising from possessions out of the United Kingdom, other than stocks, shares or rents." The expression "shall be computed on" is that regularly used in the Act to introduce a conventional method of computation of the income which is the subject-matter of the tax—see for example the rule applicable to Case I. of Sch. D and Case III., r. 2, and compare *Rex* v. *Special Commissioners of Income Tax* (1) and *Whelan* v. *Henning.* (2)

Under r. 1 of the Miscellaneous Rules applicable to Sch. D the tax is to be "charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged." In its application to cases falling under Case V., r. 2, this rule will run as follows: "Tax shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income arising from the possessions out of the United Kingdom," that income being "the income in respect of which tax . . . . is hereinbefore directed to be charged" referred to in Miscellaneous Rule 1.

The joint effect of the two rules, therefore, is that a person "entitled" to "income arising from possessions out of the United Kingdom" is liable to be charged with and to pay tax "in respect of" that income, and for the purpose of computing the amount of the income a conventional figure is taken based on a three years' average of the sums actually received in the United Kingdom or the sums so received in the year preceding the year of assessment as the case may be.

In the present case the "foreign possession" consisted of

(1) [1923] 1 K. B. 393.

(2) [1926] A. C. 293.

the right which Mrs. Timpson had under the law of the State of New York "to resort to a Court of equity to compel the Trust Company to discharge the task imposed upon it, which was to apply the net income of Mrs. Timpson's share of the residue to her use during her life"—I quote from para. 3 of the Case. It was by virtue of this possession that Mrs. Timpson was entitled to receive from the Trust Company the net income as received and ascertained by them. Any sum which the Trust Company at any moment became bound to pay over to Mrs. Timpson became, in my judgment, ipso facto income to which she was entitled, and any disposition of that income made by her or upon her instructions was a mere disposition of her income.

I need not refer in detail to the instructions given by Mrs. Timpson which give rise to the present questions. The effect of those instructions falls to be determined in accordance with the law of the State of New York, but in the absence of any finding by the Commissioners that law must be treated as being the same as English law. I cannot read these instructions as amounting to an assignment or as a declaration of trust. They are in terms merely revocable mandates, and in sending the remittances to the children the Trust Company was, in my judgment, doing no more than complying with Mrs. Timpson's directions as to the application of income to which she was entitled. Further by the terms of the documents themselves it was only on payment of the amounts to the children that the Trust Company was to be discharged from its obligation to pay them to Mrs. Timpson herself and accordingly, unless and until payment was made, the sums in question remained income of Mrs. Timpson.

If this view be correct the fact that the actual hands to receive in this country the money derived from the remittances were those of the children appears to me to be irrelevant, since provided the income in respect of which the assessment is made is income to which the person assessed is entitled it is, in my judgment, immaterial whether the sum "received in the United Kingdom" is received by him or by some third party upon his instructions.

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For these reasons, which are not quite the same as those upon which the learned judge based his judgment, I am of opinion that the appeal should be dismissed.

What the position would be in the case of an actual assignment (or declaration of trust) of moneys in the hands of foreign trustees and ready for distribution and a subsequent remittance of those moneys to the assignee (or cestui que trust under the declaration of trust) in the United Kingdom is not a question which arises in the present case and I express no opinion upon it.

Appeal dismissed.

Solicitors: *Waterhouse & Co.*; *Solicitor of Inland Revenue.*

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Landlord and Tenant—Demise of ground floor of larger building—Flue serving other parts of building running through demised premises—Right reserved to lessor to enter demised premises to execute repairs upon other parts of the building—"Making good all damage thereby occasioned"—Cleaning of flue—Whether "repair"—Damage by soot to lessee's stock-in-trade—Liability of lessor.

The ground floor of a larger building was demised to the appellant, who carried on business therein as a court dressmaker. Through the part so demised, but not forming part of the demise, there ran a flue which served the other parts of the building. The lease provided that the appellant would "permit the lessor or his . . . . agents and workmen . . . . to enter the said premises . . . . for executing repairs and alterations of or upon the other parts of the said messuage . . . . making good all damage thereby occasioned." During the currency of the lease the lessor by his agents entered the demised premises for the purpose of cleaning the flue, and as a consequence of the work that was done a quantity of soot was scattered over the appellant's stock of dresses, thereby damaging them. On a claim in respect of this damage:—

Held, (1.) that the cleaning of the flue was "executing repairs" within the meaning of the lease; (2.) that the words "making

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good all damage thereby occasioned" were not to be restricted to structural damage to the premises but were wide enough to cover damage to the appellant's stock-in-trade; and (3.) that in assessing the quantum of damage regard must be had to the question whether the appellant had taken reasonable precautions for minimizing the amount of damage.

Decision of du Parcq J. reversed.

APPEAL from a decision of du Parcq J.

The plaintiff claimed rent due under a lease in respect of a shop and premises occupied by the defendant, who carried on business there as a court dressmaker, and was given leave to sign final judgment for the rent claimed with, however, a stay of execution pending the trial of the defendant's counterclaim.

By her counterclaim the defendant stated that the premises demised to her were on the ground floor and basement of the building, the whole of which was held by the plaintiff under a lease; that the building was served by a system of chimneys and flues access to which was possible from that portion of the building occupied by the defendant. Clause 2, sub-clause 5, of the lease to the defendant provided that she would "permit the lessor or his surveyor or agents and workmen at any time during the said term to enter the said premises or any part thereof during reasonable hours in the day time . . . . for executing repairs and alterations of or upon the other parts of the said messuage and the sewers drains and watercourses gas pipes and meters and electric wires and meters thereof or thereunder and of effecting any alterations or repairs that may be necessary in or to the drains under the demised premises making good all damage thereby occasioned provided that the lessor shall not cause more interference with the lessee's business than is reasonably unavoidable." The defendant alleged that the plaintiff, claiming to be entitled so to do, had by his servants entered the demised premises and carried on operations upon the flues and chimneys which had resulted in the scattering over the defendant's stock-in-trade quantities of soot, dust and dirt, thereby seriously damaging a number of dresses. Alternatively, the defendant said that if (which was denied) the plaintiff was entitled under the lease to enter the demised premises to carry out operations in connection with the flues it was an implied term that he would conduct the operations with reasonable care and skill, but in breach of that duty he by his servants failed to take proper steps to prevent the scattering of soot, which caused the damage of which she complained. Further, if the plaintiff was entitled to enter the demised premises and conduct operations he was bound to make good all damage thereby occasioned. The defendant accordingly counterclaimed damages for trespass and/or negligence, alternatively damages for breach of covenant.

du Parcq J. found that the flue, the cleaning of which caused the damage complained of, which ran along the ceiling of the basement encased in a wooden casing, did not form part of or serve the part of the building demised to the defendant; it was useful only for the purposes of the other parts of the building; that when the plaintiff entered, as he was entitled to do, to clean the flue, he entered "for executing repairs and alterations of or upon the other parts of the said messuage"; that "executing repairs" might fairly be construed as including cleaning the flue; that the plaintiff was bound not to cause, nor did he in fact cause, more interference with the defendant's business than was reasonable; that the plaintiff's obligation as "to making good all damage thereby occasioned" meant making good physical damage to the structure or fittings, and that he was not liable to pay damages for injury done to the defendant's stock, the damage to which, he held, was probably due to the fact that the dresses were left too much exposed, and by the omission, certainly part of the time, to close the door of the room in which they were stored. He accordingly gave judgment for the plaintiff on the counterclaim.

The defendant appealed.

Gallop for the appellant. du Parcq J. was wrong in holding that the appellant was not entitled to recover in respect of the damage to her stock-in-trade. What was done by the respondent to the flue was clearly a work of "repair":

Lurcott v. *Wakely & Wheeler* (1) and *Anstruther-Gough-Calthorpe* v. *McOscar* (2), where Atkin L.J. said that "repair is not confined to houses; it applies to chattels, and it connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged." The decision in *Crofts* v. *Haldane* (3), which was relied upon by du Parcq J. as limiting repair to physical damage, does not touch this case. Here the words of sub-clause 5 are clear that "all damage" occasioned by the execution of repairs "upon the other parts of the said messuage"—and the flue in question comes within those words—has to be made good, and that obligation must include damage occasioned to the appellant's stock-in-trade.

C. P. Harvey for the respondent. The flue in question was physically a part of the demised premises, and therefore the work done did not come within the words of sub-clause 5. In *Nicholas* v. *Chamberlain* (4) it was held that "if a man erect a house, and build a conduit thereto in another part of the land, yet the conduit shall pass by a grant of the house cum pertinentiis"; see also *Wheeldon* v. *Burrows* (5); *Union Lighterage Co.* v. *London Graving Dock Co.* (6); and *Pwllbach Colliery Co.* v. *Woodman* (7) as to an easement which it is submitted this flue must be treated as being. Even, however, if it can be said that the flue was not part of the demised premises, the appellant is still not entitled to maintain her counterclaim. Reliance is placed for the appellant on the words "making good all damage," and attention is particularly drawn to the word "all." That word must not be overstressed; it merely defines the extent and not the kind of damage. *Crofts* v. *Haldane* (3) interprets such a clause as that now under consideration as meaning damage to the structure—that which was demised. The clause cannot be extended to cover consequential damage. Moreover, the damage suffered could have been avoided by the appellant taking reasonable precautions, such as covering up the dresses or moving them into another room, while the work on the flue was in progress.

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(1) [1911] 1 K. B. 905, 923, 924.
(2) [1924] 1 K. B. 716, 734.
(3) (1867) L. R. 2 Q. B. 194.
(4) (1607) Cro. Jac. 121.
(5) (1879) 12 Ch. D. 31, 49.
(6) [1902] 2 Ch. 557.
(7) [1915] A. C. 634, 646.

Greer L.J. In this case, which has been well argued, the only doubt I have had is whether the cleaning can be regarded as the "repair" of the flue. The defendant, in the first instance, bases her counterclaim on clause 2, sub-clause 5, of the lease, which permits the lessor to enter upon the premises for the purpose of (inter alia) executing repairs and alterations to or upon the other parts of the premises, that is to say, the parts not included in her lease. It was necessary that the landlord should have an opportunity of entering the demised premises, not merely for the purpose of viewing their state of repair, but for the purpose of executing repairs upon other parts of the messuage not included in the lease, and I cannot imagine a better illustration of the other parts of this messuage not included in the lease to the defendant, than the flue, which was of no benefit to her, but which had to be kept in condition by the landlord in order to benefit the other parts of the building. I am satisfied that as between these parties the flue was not part of the demise to the defendant, but was a part of the messuage which the landlord had the liberty to come upon in order to put it in repair.

As I have said, I have had some hesitation in coming to the conclusion that the word "repair" is wide enough to include the cleaning of the flue, but as between these parties I feel bound to treat the word as covering the maintenance of the flue in the condition in which it ought to be to carry out the purposes for which it was placed where it was—namely, to provide heat to the other parts of the building which were let out as flats. If that be so, then the permission to go on to the premises to do that work was subject to the other terms of sub-clause 5—namely, that the landlord would make good all damage thereby occasioned. It has been argued, however, that "damage" in that clause is limited to damage to the structure. That argument carries no weight to my mind when it is remembered what it was that was let

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and the purpose for which it was let. There is an undertaking by the lessee to use the premises for the business of dressmaking and millinery or for such purpose or purposes as may from time to time be authorized by the previous consent of the landlord. It was, I think, intended that if the landlord took advantage of the permission given by sub-clause 5 he should be responsible for all the damage thereby occasioned, which would include damage to the defendant's stock-in-trade, and if he could not make it good by restoring the frocks to the condition in which they were before the operations began, he would have to pay for having failed to do that which he had undertaken to do—namely, make good all damage thereby occasioned. Mr. Harvey contended that we ought not to hold that there was any damage thereby occasioned, because the lessee might have prevented the damage by moving her goods from the position in which they were to some other part of the premises. I agree that she was under an obligation to take all reasonable steps to see that damage would not be occasioned by the landlord's operations, but it is a question of fact still to be determined whether by removing her frocks from the showroom to the office she did all that reasonably could be expected of her in the circumstances. I think the learned judge came to a wrong conclusion on the construction of this clause, being persuaded by Mr. Harvey that it referred only to structural damage to the premises. With that view I disagree. I think the sub-clause is wide enough to cover damage to the stock-in-trade on the premises. The quantum of damage remains to be determined, and in deciding that the referee will have to consider whether or not the defendant could, at reasonable expense, which she would have been entitled to recover, have prevented the damage which occurred.

For the reasons I have given this appeal must be allowed, and an order will be made for a reference to assess the amount of damage.

SLESSER L.J. I am of the same opinion. Although at different times the case on behalf of the defendant has been put in different ways, by the time it fell to us for determination it was limited really to one matter—namely, whether the defendant can show that she is entitled to damages by reason of clause 2, sub-clause 5, of her lease. [The Lord Justice read the clause, and continued:] In order that the defendant counterclaiming may bring herself within these words she must show that the lessor or his agent entered for executing repairs and alterations of, or upon, the other parts of the messuage, and, therefore, the first question is whether this flue, the cleaning of which has caused or is alleged to have caused the damage, was, or was not, another part of the premises. If the flue was itself a part of the premises demised to the defendant then of course sub-clause 5 would not apply.

In my opinion it is clear, when the parcels and the intentions, as gathered from the lease, are considered, that this flue was no part of the demised premises. The parcels are a lock-up shop, " being part of the ground floor of the messuage known as 25 Hanover Square in the county of London, together with the basement under the said demised shop and the drains and watercourses thereunder." There is no demise in terms of this flue, which is a self-contained pipe, having no connection with the defendant's premises except that there are certain facilities for the cleaning of it upon those premises. The flue in no way serves the comfort or convenience of the defendant or the purposes of her business. Met with that difficulty, and being constrained to admit that the flue was used by the other tenants and was being so used at the time when this demise was made, Mr. Harvey attempted to show that the flue passing through or near these premises was itself a part of the demised premises—that there was an easement whereby the defendant agreed that the fumes and products of combustion passing through the flue should pass through her premises by way of easement. There is no express easement reserved. Mention is made of the reservation of other easements in the lease; but none in reference to a flue. It would be necessary, therefore, for Mr. Harvey to show that this was an easement of necessity. I do not propose to discuss the case of *Nicholas* v. *Chamberlain* (1), of which differing views have been taken in the more recent case of *Wheeldon* v. *Burrows* (2), where Thesiger L.J. was of opinion that the supply of water there was by way of easement, while James L.J. (3) thought that in *Nicholas* v. *Chamberlain* (1) "the Court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses;" there then follows this interesting passage (4): "They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house."

In these matters no one case is conclusive authority for another; each must depend upon the express language used and the purpose of the particular demise, but it is interesting to observe that James L.J. in coming to the conclusion that in *Nicholas* v. *Chamberlain* (1) the conduit through which the water ran was not an easement but a corporeal part of the house, drew the analogy of a flue passing through another man's house. I think that it is impossible to say that this flue is an easement of necessity. As was said by Stirling L.J. in *Union Lighterage Co.* v. *London Graving Dock Co.* (5) an easement of necessity is not one merely necessary to the reasonable enjoyment of the property; it is one without which the property retained cannot be used at all. This flue was not such a one. The need for it might well have been supplied by electric heating, gas, or in some other way. If it is not an easement, it follows, apart from the actual language of the demise, that it was not part of the property demised.

The third view, which I think Mr. Harvey would hesitate to accept, is that the defendant had full disposition over the flue as being part of her premises, and there being no easement,

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(1) Cro. Jac. 121.
(2) 12 Ch. D. 31.
(3) Ibid. 60.
(4) Ibid. 61.
(5) [1902] 2 Ch. 557, 573.

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she could at any moment have closed it up and refused to allow any soot or other matter to pass through it. That is a view which only requires to be stated to be rejected, it being clearly contrary to the intention of the parties.

I agree with Greer L.J. as to the second matter which arises, that is, that the flue being another part of the messuage the cleaning of it as part of the execution of repairs and alterations fell within sub-clause 5, that is to say, the making of the flue more efficient by the removal of soot or other matter which impeded its proper function, seems to be covered by the words "executing repairs and alterations." I take the word "repair" as meaning, in the language of Lord Blackburn in *Inglis* v. *Buttery & Co.* (1), the making good defects, including renewal where that is necessary. It may properly be said that an apparatus is repaired when an obstruction which is a defect in its proper working is taken out, even though in any particular case renewal does not prove to be necessary. That was the view of du Parcq J. in *Bishop* v. *Consolidated London Properties.* (2) There a dead pigeon got into a pipe, with the result that an obstruction was caused which in its turn caused an overflow of water. On the question of reparation the learned judge said this: "I have come to the conclusion that a pipe which is choked and not able to do its duty as a pipe is out of repair." That seems to me to be the proper conclusion. In another case, *Melles & Co.* v. *Holme* (3), the obligation was to keep in good and tenantable repair, but it was dealt with on the principle of the cases relating to repairs. Salter J. was there considering the effect of a stoppage due to ashes discharged from chimneys which had fallen upon the roof and got into a gutter, and he said this: "In some cases no doubt there must be read into a covenant by a landlord to repair a condition that the tenant must give him notice of want of the repair before he can be entitled to complain of it," and he treated the obligation to remove that obstruction as a reparation. That, as it seems to me, is sufficient to determine the matter.

(1) (1878) 3 App. Cas. 552, 579. (2) (1933) 148 L. T. 407, 410.
(3) [1918] 2 K. B. 100, 104.

There remains the question whether it can properly be said in this case that, repairs having been necessary on other parts of this messuage, the lessor was under an obligation to make good all damage thereby occasioned, meaning thereby, not merely damage caused to the actual structure repaired, but damage generally done to the defendant? It is unnecessary to repeat what Greer L.J. has said upon this point. The words used are words of complete generality, and there is no reason for restricting them in the way contended for by Mr. Harvey. It will also be observed that in *Crofts* v. *Haldane* (1) the language was "make good all damage occasioned thereby to the adjoining premises"; it was limited in that way. No such words of limitation occur in the present obligation to repair, and if it should be found in the reference that damage has been occasioned by the execution of repairs and alterations upon other parts of the messuage as contemplated in clause 2, sub-clause 5, then, applying the ordinary considerations, including the question of the defendant's obligation to minimize the damage and to act reasonably, it will be a matter for the referee to estimate the exact extent of the damage occasioned to the defendant.

SCOTT L.J. I agree, and I desire to adopt the language of Greer L.J., which I think covers the whole interpretation of the lease. I wish, however, to add a few observations. Where, as in this case, the dispute involves the construction of a written document, it is often dangerous, usually useless, and almost always undesirable, to cite cases about other documents. Secondly, unless a word in a document is a word of art, with a definite legal meaning, it should be given its natural meaning in the English language. The word "repair" is an ordinary English word and its natural meaning is wide; it should not be limited, as it was sought to limit it, to such dealings with a piece of plant or machinery or structure as involve a renewal of some part. Renewal is not the essence of repair. It is only one form of repair. If plant or machinery is found not to be in good working order, the operation, whatever it may be of putting it in good working order is properly called a work of "repair." If one's motor-car is not running well and is sent to the works for overhaul, one would normally regard it as "repair" work even if told that all that had to be done was to decarbonize the cylinders. People use ordinary words in rather a wide sense. Without the word "repair" in the clause we are construing there would have been no provision for the ordinary and inevitable work the landlord would have to do as lessee under his head-lease in order to keep in good working condition a piece of plant which was essential to the working of the hot-water apparatus of the flats in the other parts of the building. The natural interpretation of the word is that put upon it by Greer L.J. and Slesser L.J.

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(1) L. R. 2 Q. B. 194.

The learned judge held that the flue was no part of the demised premises. I agree it is not mentioned in the parcels; in a composite building containing a large number of tenements, some parts are necessarily retained in the possession of the landlord; therefore where a demise of a particular tenement is carved out of the whole with an affirmative description of what is let, there is no ground for including in the demise something which is not described as being let, merely because part of the building may happen physically to pass through or be in the middle of the demised tenement—at any rate where it is of a nature to call for retention by the landlord.

Where we differ from the learned judge is as to the meaning of the words "making good all damage thereby occasioned." In the course of the argument I put to Mr. Harvey the question whether if the proviso forbidding any unnecessary interference with the lessee's business had been written at the beginning of the clause and the reference to the two purposes for which the right of entry was granted by the lease were treated as subsidiary, the words "making good all damage thereby occasioned" would not necessarily apply to the whole clause and would not then obviously mean "make good all damage caused to the lessee" by the exercise of the right of entry or

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incidental to it. That in my view is the right interpretation of the clause as a whole.

Appeal allowed.

Solicitors for appellant: *Forsyte, Kerman & Phillips.*
Solicitors for respondent: *Walbrook & Hosken.*

J. S. H.

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POWELL *v.* SHEFFIELD CORPORATION.

Local Government—Amalgamation of Authorities—Transfer of Officer—Agreement for compensation—Adoption by second Authority of Superannuation Act—Transferred Officer holding established post—Right to claim superannuation allowance—Exclusion of service with first Authority—Ministry of Health Provisional Order Confirmation (Sheffield Extension) Act, 1921 (11 *&* 12 *Geo.* 5, *c. lxix.*), *Schedule, arts.* 50, *paras.* 1, 2, 3; 52*—Local Government and Other Officers' Superannuation Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 59), *ss.* 3, 6, 22, 30.

The claimant was employed in the service of the H. Urban District Council. That council was, in 1921, amalgamated with the city of S. By an agreement entered into between the claimant and the S. Corporation in 1920, before but in contemplation of the amalgamation, it was agreed that the corporation should pay to the claimant an annuity of 300*l.* as compensation "in full discharge for all claims to which he shall or may become entitled in any respect whatsoever by reason of his said office or otherwise in relation to the said urban district of H." This annuity was to be suspended while the claimant should hold any office under the S. Corporation. He in fact entered their service as from the date of the amalgamation and continued to hold a post in the engineer's and surveyor's department until he attained the age of sixty-five years on January 15, 1935.

In 1930 the S. Corporation adopted the Local Government and Other Officers' Superannuation Act, 1922, and among the posts which they designated as established posts for the purpose of that Act was the post of "divisional surveyor." The claimant maintained that the post which he held was that of "divisional surveyor" and that he was therefore entitled to claim a superannuation allowance under the Act of 1922, in addition to the annuity payable under the agreement of 1920. The corporation did not admit that the claimant held the post of district surveyor, and threatened to dismiss him from their service if he did not withdraw his claim. In October, 1932, the claimant and the corporation entered into an agreement under seal (expressed to be supplemental to the agreement of 1920) whereby it was declared that the claimant held his employment at the pleasure of the corporation, and that the post which he occupied was not and should not be deemed to have been designated as an established post for the purpose of the Act of 1922. It was also agreed that the claimant withdrew his claim and should not at any time be entitled to receive superannuation allowance from the corporation.

On reaching the age of sixty-five years the claimant retired and claimed that he was entitled to superannuation allowance, and that in calculating the amount his service with the H. Urban District Council must be taken into account. He contended that the agreement of 1932 was void as being an attempt to "contract out" of the Act of 1922. The corporation contended that the agreement was valid. They did not contend that the rights of the holder of an established post could be diminished by "contracting out," but that this was a bona fide compromise of a dispute whether the claimant did hold an established post. Anyhow, they said, the service with the H. Council was excluded by the terms of art. 52 of the Provisional Order effecting the amalgamation: ". . . . no officer shall be entitled to claim or receive both compensation for any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary and a superannuation or retiring allowance in respect of the same period of service and the same pecuniary loss."

The matter having been referred to arbitration under s. 22 of the Act of 1922, the arbitrator found as a fact that the claimant did occupy an established post as district surveyor, and decided in his favour on both points, but stated his award in the form of a special case:—

Held, by du Parcq J.: (1.) That the agreement of 1932 was void. The rights conferred by the Act of 1922 could not be got rid of by "contracting out" either directly or by the indirect method of agreeing that a post which was (as the arbitrator had found) an established post should "not be deemed to be" an established post. (2.) That the claimant's service with the H. Council must be excluded in arriving at the amount of the superannuation allowance.

AWARD stated in the form of a special case by an arbitrator appointed by the Minister of Health under s. 22 of the Local Government and Other Officers' Superannuation Act, 1922 (hereinafter referred to as "the Act of 1922").

The claimant, Bernard Powell, after service with other public bodies, was appointed in June, 1901, engineer and

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surveyor to the Handsworth Urban District Council. He continued in their service until November 9, 1921. On that day there came into operation the Ministry of Health Provisional Order Confirmation (Sheffield Extension) Act, 1921 (11 & 12 Geo. 5, c. lxix.) (1), whereby the boundaries of the

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(1) The Provisional Order scheduled to the Act provides:

Art. 50: "(1.) The provisions of subsection 13 of section 118 and of section 119 of the [Local Government] Act, 1888, shall apply to all persons who at the commencement of this order hold office as officers or servants of the Handsworth Council . . . . with such modifications as are necessary to make those provisions applicable to the said officers and servants and to the corporation.

"(2.) . . . . every other officer or servant who by virtue of this order or of anything done in pursuance or in consequence thereof suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary and for whose compensation no other provision is made by any enactment for the time being in force and applicable to his case shall be entitled to have compensation paid to him by the corporation for that pecuniary loss.

"(3.) In determining the compensation payable to any person who becomes entitled to compensation in pursuance of this article regard shall be had to the conditions and circumstances mentioned in subsection 1 of section 120 of the Act of 1888 and the compensation shall not exceed the limit therein mentioned."

Art. 52: "Subject to the provisions of this order no officer shall be entitled to claim or receive both compensation for any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary and a superannuation or retiring allowance in respect of the same period of service and the same pecuniary loss."

Sect. 118, sub-s. 13, of the Local Government Act, 1888, provides that all persons holding specified offices on the appointed day should become officers of the county council. Sect. 119, sub-s. 1, provides that the officers thus transferred to the county council shall hold their offices by the same tenure and on the same terms and conditions as if the Act had not passed and while performing the same duties should receive not less salaries or remuneration, and be entitled to not less pensions, (if any), than they would have if the Act had not passed.

Sect. 120, sub-s. 1, provides that in assessing compensation regard shall be had "to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act . . . . and to all the other circumstances of the case, and the compensation shall not exceed the amount which, under the Acts and Rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office."

The Local Government and Other Officers' Superannuation Act, 1922, s. 3: "'Officer,' or 'servant,' means an officer or servant in the permanent service of the local authority occupying a city of Sheffield were extended so as to include the Handsworth Urban District. The claimant's salary and emoluments amounted at that time on the average to 830*l.* a year.

On June 18, 1920, an agreement was entered into by the corporation and the claimant which recited that whereas it had been agreed between the corporation and the Handsworth Urban District Council that, in the event of the city of Sheffield being extended so as to include Handsworth, the corporation would provide adequate compensation for certain specified officials of the Handsworth Urban District Council (including the claimant), it was thereby agreed between the parties that such adequate compensation as aforesaid should be in the case of the claimant the sum of 300*l.* a year, " such annuity to become payable from the day on which the Order for the inclusion of the Handsworth Urban District within the city of Sheffield shall come into operation and to be in full discharge for all claims to which the said Bernard Powell shall or may become entitled in any respect whatsoever by reason of his said office or otherwise in relation to the said urban district of Handsworth. Provided always that such annuity shall be suspended while the said Bernard Powell shall hold any office under the corporation and shall become payable from the day on which the said Bernard Powell shall cease to be employed by the corporation."

In 1921 the corporation offered to the claimant, and he accepted, an appointment in the department of the city engineer and surveyor at a salary of 600*l.* a year. It was contended on behalf of the claimant that he occupied the position of divisional surveyor throughout the period of his employment by the corporation. The corporation denied that the claimant was appointed divisional surveyor or

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post designated as an established post for the purposes of this Act by a resolution of the local authority, and whether in receipt of salary or wages."

Sect. 30: " Nothing in this Act shall prejudice or affect any express provision contained in any Act of Parliament or any order confirmed by or having the effect of an Act of Parliament relative to any superannuation or retiring allowance or any other allowance of a similar character in the case of any officer or servant referred to in such provision."

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occupied that office at any time while in their employment. The arbitrator found as a fact that the claimant occupied the position of divisional surveyor throughout his period of employment by the corporation and that he was at all material times officially recognized by them to be holding that position. It was admitted by the corporation that there was no person other than the claimant holding such a position.

On February 25, 1930, the finance committee of the corporation resolved: " That in the event of the council deciding to adopt the Act [that is, the Act of 1922], the following list of posts to be designated posts—that is, posts to which the Act of 1922 shall apply." Then followed a list of posts to be designated established posts for the purposes of the Act, to which was prefaced a note stating that " the posts designated are those occupied by persons appointed on the permanent official staff of the corporation." The list for the city engineer and surveyor's department expressly mentioned " divisional surveyor."

That resolution was confirmed on March 5, 1930, by the Sheffield City Council, which, on the same day, adopted the Act of 1922, to come into operation on July 1, 1930. The resolution was confirmed on May 7, 1930, and the schedule of " established posts " contained the entry " divisional surveyor—1."

The printed statements of the corporation's staff indicated by a letter E against the claimant's name that he held an established post.

On June 16, 1930, the city engineer sent to the claimant a circular letter stating that the adoption by the corporation of the superannuation scheme necessitated the production by all officers of their birth certificates and certificates of previous service, if any, with other local authorities. When the claimant produced his birth certificate the city engineer informed him that he did not come under the new scheme as his superannuation was arranged in another way. When the claimant demurred to this he was referred to the Town Clerk. On August 1, 1930, the Deputy Town Clerk addressed a note to the claimant headed " Superannuation," in which he enclosed a form of certificate as to previous service with other local authorities and requested the claimant to fill in the particulars. This certificate was printed as follows: "I, the undersigned, being in your service and the occupier of a post designated by you as an established post for the purpose of this Act, hereby apply to you to reckon for the purposes of the Act my services with other local authorities set forth hereunder."

In July, 1930, the Town Clerk asked the claimant whether he would modify the terms of the agreement of June 18, 1920, so as to reduce the 300*l.* a year payable thereunder to 156*l.* a year, and informed him that if he would not agree to this the corporation would consider the question whether he was an established officer. The claimant refused. He was then asked to agree that he was not the occupier of an established post, and in consequence not entitled to superannuation under the Act of 1922. He was informed that if he did not so agree he would be dismissed from the service of the corporation.

The claimant protested throughout these negotiations that he was entitled to come under the provisions of the Act of 1922, and declared repeatedly that the corporation had already recognized him as an established officer for the purposes of the Act. As a result of the pressure which was brought to bear on him by the threat of dismissal, he entered into an agreement under seal with the corporation on October 3, 1932.

That agreement, which was expressed to be supplemental to the agreement of June 18, 1920, after reciting that it was claimed by the claimant and denied by the corporation that the claimant was the occupier of an established post designated for the purposes of the Act of 1922, and that the corporation had informed the claimant that they were not prepared to continue to employ him unless he withdrew the said claim, declared that it was agreed between the parties as follows:—

"(1.) That he the said Bernard Powell holds the said employment at the pleasure of the council;

"(2.) That the post which the said Bernard Powell occupies is not and shall not be deemed to have been or to be designated as an established post for the purposes of the Act of 1922;

"(3.) That he the said Bernard Powell hereby withdraws the claim he has made as hereinbefore recited and hereby agrees that he is not and shall not at any time as of legal right on resigning from or otherwise ceasing to hold his office or employment under the corporation be entitled to receive any superannuation whatsoever from the corporation and that he will not claim to be entitled to receive any such allowance."

The claimant remained in the service of the corporation until January 15, 1935, on which date he attained the age of sixty-five years.

The claimant stated in evidence before the arbitrator that after signing the agreement he still regarded himself as occupying an established post. On March 30, 1935, his solicitors wrote to the Town Clerk stating that the corporation had been under a misapprehension as to the claimant's position under the Act of 1922, and asking what action the corporation proposed to take. The corporation replied that they proposed to take no action and the claimant's solicitors then informed the Town Clerk that the claimant would submit his claim to arbitration.

The arbitrator found as a fact that the claimant was at all material times the occupier of a post which the corporation designated as an established post for the purposes of the Act of 1922, and that accordingly he was an "officer" as defined in s. 3 thereof.

Assuming that the claimant was an established officer, the main question of law involved related to the agreement of October 3, 1932.

It was contended for the claimant: (1.) That the agreement was invalid in itself, because the Act of 1922 did not permit a local authority to revoke the designation of an officer who had once been designated as the holder of an established post for the purposes of the Act. (2.) That a serving officer occupying an established post could not have his status altered to his detriment either with or without his consent. (3.) That while the Act left it within the entire discretion of the local authority to adopt a superannuation scheme, and to designate such posts as they chose, it did not permit any contracting out of the Act in the case of an officer who had once been brought within its provisions. (4.) That *Salford Guardians* v. *Dewhurst* (1) was authority for these propositions, which were also in accord with common sense and practical expediency. (5.) That no consideration was given or promised by the corporation in the agreement, since the claimant was liable to dismissal at any time, and was accorded no assurance of continued employment. (6.) That the agreement could not be regarded as a valid compromise, since it did not purport to be one, and did not embody a reciprocal abandonment of claims, there being no abandonment of any claim or right by the corporation.

It was contended for the corporation: (1.) That contracting out of the Act of 1922 is not only permitted but contemplated by the statute, as was shown by the words "in default of agreement" in s. 22. (2.) That *Salford Guardians* v. *Dewhurst* (1) was not applicable, since the Poor Law Officers' Superannuation Act, 1896, to which that case referred, laid down a compulsory system, whereas superannuation under the Act of 1922 was voluntary and within the discretion of the local authority. (3.) That the agreement of October, 1932, constituted a valid contracting out of the Act. (4.) That as the agreement was under seal no question of consideration could arise; but that, if it did, good consideration was given by the corporation in that they continued to employ the claimant for a further period of three years, which they would not otherwise have done. (5.) That, alternatively, the agreement constituted a valid compromise since there was at the time when it was made a bona fide dispute between the parties whether the claimant occupied an established post, which dispute was determined by an agreement that he was never inside the Act of 1922. (6.) That in deciding whether a compromise should be enforced or set aside regard should be had to the honesty of the parties, and that the claimant acted in bad faith since he never had any real intention of carrying out his professed intention of abandoning all claims to a superannuation allowance. (7.) That an agreement of that kind was justified on grounds of public policy since its object was to avoid disputes, and that the agreement in question was equitable in so far as it sought to prevent the claimant from receiving both compensation for loss of office and a superannuation allowance.

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(1) [1926] A. C. 619.

The following cases were referred to before the arbitrator: *Callisher* v. *Bischoffsheim* (1); *Miles* v. *New Zealand Alford Estate Co.* (2); *Holsworthy Urban District Council* v. *Holsworthy Rural District Council.* (3)

The arbitrator held that the agreement of October 3, 1932, was invalid on the ground that, while it was within the discretion of a local authority to adopt the Act of 1922, and, having adopted it, to designate such offices as they thought fit, it was not open to them under the Act subsequently to remove an established officer from its ambit, with his consent or otherwise. He was of opinion that *Salford Guardians* v. *Dewhurst* (4) was applicable to the case.

It was further contended by counsel for the corporation that, even apart from the agreement of October 3, 1932, the claimant was barred from claiming superannuation allowance in respect of part of his service by virtue of the provisions contained in the Ministry of Health Provisional Order Confirmation (Sheffield Extension) Act, 1921 (11 & 12 Geo. 5, c. lxix.), and that art. 52 clearly precluded the claimant from claiming superannuation allowance in respect of his service with the Handsworth Urban District Council. He further contended that s. 30 of the Act of 1922 was not limited to superannuation or retiring allowances already accrued or vested at the time when the Act was enacted.

It was contended for the claimant that art. 52 was irrelevant in that it did not apply to claims which might arise in futuro, but only to claims arising immediately out of the amalgamation of Handsworth with Sheffield; and that the Provisional

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(1) (1870) L. R. 5 Q. B. 449.

(2) (1886) 32 Ch. D. 266, 283–4.

(3) [1907] 2 Ch. 62, 73.

(4) [1926] A. C. 619.

Order could not defeat a claim arising several years later under an Act not at that time on the statute book. It was further contended that art. 52 was essentially a provision against a claim being made at that time for double pension.

The arbitrator held that art. 52 of the Provisional Order did not operate so as either to defeat the present claim or to enable the corporation to exclude the claimant's service with the Handsworth Urban District Council for the purpose of calculating the superannuation to which he was entitled.

It was agreed that if the claimant had a right to a superannuation allowance the amount to which he was entitled was 262*l.* 1*s.* 8*d.* a year if the entire period of his service was to be reckoned, or 120*l.* 8*s.* 4*d.* a year if his service with the Handsworth Urban District Council was to be excluded.

The arbitrator found and awarded that the claimant was entitled to superannuation allowance under the Act of 1922 in respect of the entire period of his service from March, 1898, to his retirement on January 15, 1935, and that the corporation should pay him such allowance at the rate of 262*l.* 1*s.* 8*d.* a year.

The questions of law for the opinion of the Court were (1.) whether the agreement of October 3, 1932, was valid and binding; and (2.) whether, if the claimant was entitled to superannuation, the period of his employment with the Handsworth Urban District Council should be excluded for the purpose of calculating the amount of his superannuation.

Montgomery K.C. and *W. A. Macfarlane* for the corporation no longer contended that it was possible to "contract out" of the Act of 1922, in the case of an officer admittedly holding an established post. They sought to uphold the agreement as a bona fide compromise of a dispute whether the claimant did or did not hold such a post. With this exception they relied substantially on the contentions put forward before the arbitrator.

Croom-Johnson K.C. and *Paul C. Davie* for the claimant, in addition to relying upon the arguments used before the arbitrator, drew attention to the wording of art. 52 of the

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Provisional Order. In order to bar an officer's claim to superannuation allowance the compensation had to be in respect of the same period of service *and* the same pecuniary loss. It might have been more natural to expect "*or*" the same pecuniary loss. But they submitted that as it stood the wording was only suitable to the case of a man who at the date of the amalgamation was already at an age at which he was entitled to retire. Such a man could not take his compensation and claim his superannuation allowance as well, but must elect. The article had no application to a man who entered the new authority's service, but at a reduced salary, receiving compensation proportionate to his then period of service for that pecuniary loss, and who many years later on reaching the retiring age claimed a superannuation allowance based on a different period of service and a different pecuniary loss.

DU PARCQ J. I have hesitated whether in this case I should give my judgment now or reserve it; but as I have come to a conclusion, I think it is better that I should give judgment now while the arguments are fresh in my mind.

It is not necessary, I think, that I should state the facts in any detail. They have already been found by the arbitrator, and I have nothing to do with his decision upon the facts except to accept it. What I am asked to do and what I am bound to do is to say whether or not the arbitrator is right in his view of the law. I shall, therefore, only state enough of the facts to make what I say comprehensible. [His Lordship gave a brief summary of the facts as stated in the award.] In 1935 the claimant attained the age of sixty-five. He was given notice that on attaining that age his employment would cease, as it would I think necessarily cease unless it was extended by the corporation, and he made a claim under the Act of 1922 to superannuation allowance. He was met with two answers. The first, if it is right, goes to the whole of his claim. The arbitrator has held that it is not an answer to the claim at all. Mr. Montgomery has put it, I need hardly say, very clearly before me, and it is this. The agreement of October 3, 1932, was one which was under seal, so that it is not necessary to consider whether or not there was consideration for it. Mr. Montgomery says that there was consideration for it, because the corporation said: We shall not at once cease to employ you, as we should if you did not give up your claim; and, treating it as an enforceable contract, Mr. Montgomery says: This is a case in which the corporation and the claimant were at odds; they did not agree as to a question of fact—it might possibly be in part a question of law; but it is, I think, in this case mainly a question of fact—whether the claimant was an officer occupying a post designated as an established post or not, and, in order to settle their differences, they entered into an agreement with him by which they gave some consideration and he agreed that the post that he occupied was not and should not be deemed to have been or to be designated as an established post.

On that point I agree with the arbitrator. One thing is plain and Mr. Montgomery did not argue the contrary. A man who is entitled to a superannuation allowance under the Act of 1922—I am not limiting what I say to that Act, of course; but it is the only Act with which I have to deal to-day—has a vested and inalienable right to that superannuation allowance. He cannot, as it is sometimes put, "contract himself out" of that right. He cannot by entering into any agreement divest himself of that right. The principle is established in the case of *Salford Guardians* v. *Dewhurst* (1) in the House of Lords, and, as I have said, Mr. Montgomery accepts that view of this case. He agrees that an agreement by which the claimant has given up his rights would be unenforceable and worthless. If the claimant had said: "Although I am an officer occupying a post designated as an established post, I will for good consideration abandon the right to superannuation allowance which that position gives me," it is not suggested that the agreement would be enforceable. I do not think that the distinction which Mr. Montgomery suggests can be drawn. At the date when

(1) [1926] A. C. 619.

that agreement was entered into Mr. Powell, the claimant, either was or was not occupying a post designated as an established post. We now know that he was occupying such a post. That is the fact and, even though he had doubts whether he was occupying such a post and even though the Sheffield Corporation may have felt no doubt that he was not occupying such a post, it does not affect the fact, which nothing can alter when it is once granted that it was the fact, that he was occupying such a post. In my view, if a man who does occupy an established post, if I may so call it for brevity's sake, says: "I am willing to agree that I am not occupying an established post or that I shall be deemed not to be occupying an established post," he is only saying in other words: "I am willing to give up the vested and inalienable right which the occupation of the post which in truth I do occupy gives me." I cannot draw the distinction which I was asked to draw between contracting out and contracting that you are not to be deemed to be in. I do not think that the distinction is one which ought to be drawn and I do not think that the Courts ought to try to find ways of enabling people to give up rights of such importance as the right to a superannuation allowance. Therefore, upon that point I agree with the contentions of Mr. Croom-Johnson and with the decision of the arbitrator.

The second point is this. Mr. Montgomery says that the agreement of June 18, 1920, provided for the payment of compensation for pecuniary loss by abolition of office or diminution or loss of fees or salary, and he relies on art. 52 of the Provisional Order confirmed by the Ministry of Health Provisional Order Confirmation (Sheffield Extension) Act, 1921. This contention which was also rejected by the arbitrator, does not provide a complete answer to the claimant's claim to superannuation allowance. He is claiming it not only in respect of his service to the Sheffield Corporation, but also his service to the Handsworth Urban District Council. Mr. Montgomery says that he cannot have it in respect of the latter; he is receiving compensation in respect of the abolition of his office with the Handsworth Urban District Council or diminution or loss of fees or salary owing to his transfer to the Sheffield Corporation and, that being so, he cannot in respect of that same period of service and the same pecuniary loss, to use the words of the Act of Parliament, which I think need a little gloss put upon them to be comprehensible, whichever view one takes of the section, have both compensation and superannuation or retiring allowance. That seemed at first sight fairly plain, but the matter is not a simple one and needs consideration.

Mr. Croom-Johnson says: First of all, it is to be borne in mind that in 1920 when this agreement was entered into and in 1921 when the Provisional Order Confirmation (Sheffield Extension) Act, 1921, was passed, neither the claimant nor any one else could have any claim to a superannuation allowance under the Act of 1922, which had not yet been passed; he had no right, vested or otherwise, until 1922, and it may be that, apart from that Act of 1922, he would not have been entitled to any superannuation allowance at all under any Act. Mr. Croom-Johnson says that art. 52 of the Provisional Order of 1921, confirmed as it was by the Act, could not take away a right which only vested in the claimant in 1922. Then he says also that that art. 52, when it says that an officer is not to have both compensation and superannuation allowance, means compensation under the Order assessed in accordance with the Order, which, by reference, sends one back to sections of the Local Government Act of 1888, including s. 120 of that Act. He says that art. 52 means that, whereas an officer was entitled to say that he was to have payment forthwith of compensation and be at once compensated, he could not, if he had reached the age of sixty and done forty years' service, which would entitle him to superannuation allowance (assuming for this purpose that one has to consider what he became entitled to under the Act of 1922), go to the authority and say: Now I am sixty; I have done enough service to entitle me to superannuation allowance; I will take it and my compensation too. He says that that at the most is what the section means and that it is only referring to compensation paid at once and in a lump, as I understand him, and calculated in accordance with the Act of 1921. I think that I have summarized, though I do not profess to have put them as attractively as Mr. Croom-Johnson did, the points upon which he relies.

I have come to the conclusion that upon this part of the case the arbitrator has not taken the right view and that Mr. Montgomery's contentions are right. It is to be observed that the arbitrator says, when dealing with the Provisional Order, which came into operation on November 9, 1921: "The corporation had in effect compounded in advance for any right to compensation which might be conferred by the Provisional Order and the confirming Act. It was not suggested at the hearing that there was anything illegal in the corporation taking this step, nor has either party to the dispute impugned the validity of the agreement of June 18, 1920." I understand Mr. Croom-Johnson not to dissent from that view. Therefore, one starts with this, that the agreement of 1920, as is conceded, is one which could quite properly be made, on the assumption that it means that the corporation are, to use the learned arbitrator's phrase, compounding in advance for any right to compensation. There is no reason why, as far as I can see, the corporation should not say: We will agree with you what you are to have by way of compensation. There is nothing in that in the least comparable with an attempt to contract out of a right to superannuation allowance. On the contrary, when the Provisional Order was made and confirmed it was made clear that the corporation in the first instance, applying the Act of course, could say what compensation was to be payable and, unless that was objected to by the claimant, the matter would remain there. It is plain enough, as I think I have said already, that the parties knew pretty well what was going to happen or what was likely to happen, and I have no doubt, looking at this agreement, that they were saying: The claimant will be entitled to compensation; if what we expect to happen does happen, we do not know exactly what compensation he will be entitled to (though I dare say they might have added that they could make a fairly accurate surmise); we may be giving him too much; we may be giving him too little; but, at any rate, we agree that he is to have 300*l.* a year, but that, whilst he is employed by us (if he does enter our employment), he shall not receive the 300*l.* per annum. I am not concerned in the least, when once it is conceded that that is a legal and enforceable agreement, with the question whether the 300*l.* a year, payment of which was suspended as it was suspended, was too little or too much; whether it was a provident or an improvident agreement for the plaintiff to enter into. Those questions are quite irrelevant. Having entered into that agreement, it appears to me that when in 1921 the Provisional Order was confirmed the claimant was in the position of having received, in the sense that he had an enforceable promise to pay, compensation, and that he was in a position to claim and intending to claim that compensation for direct pecuniary loss, and his position to-day is that he is receiving, I suppose, that compensation of 300*l.* a year for the rest of his life. It seems to me that it is impossible to hold that "compensation" in art. 52 refers only to compensation assessed subsequently to and in accordance with the provisions of the Order and Act of 1921 and that it must also include compensation assessed in anticipation of such an Order and in respect of the matters dealt with by art. 52.

Mr. Croom-Johnson says that there is one conclusive answer to Mr. Montgomery's contention, even if he is wrong on every other point. He says: Whatever is enacted in 1921 cannot affect a right which is vested in the claimant under the Act of 1922. Mr. Montgomery replies to that by referring me to s. 30 of the last-mentioned Act, which provides: "Nothing in this Act shall prejudice or affect any express provision contained in any Act of Parliament or any order confirmed by or having the effect of an Act of Parliament relative to any superannuation or retiring allowance or any other allowance of a similar character in the case of any officer or servant referred to in such provision." I think Mr. Montgomery is right in saying that by that saving clause the Legislature have made it plain that, although the right

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to a superannuation allowance did not exist in 1921, a provision such as is contained in art. 52 of the Order of 1921 is to have the effect of preventing a man from getting superannuation allowance in respect of the period with regard to which he has already received compensation. I do not know that art. 52 is very happily worded, but I think it is reasonably plain that it means, as Mr. Montgomery suggested, that, having regard to the fact that compensation is to be assessed with reference to the length of period of service with a particular employer in accordance with the Local Government Act of 1888, when a man has had compensation in respect of such a period he cannot also have superannuation allowance in respect of that period in respect of which his pecuniary loss has already been made up to him.

For these reasons I think that the arbitrator was wrong as to the second point.

The result is that I say as to the question whether the agreement of October 3, 1932, was valid and binding that it is not, and as to the question whether, if the claimant is entitled to superannuation, the period of his employment with the Handsworth Urban District Council should be excluded for the purpose of calculating the amount of his superannuation I answer that it should be so excluded.

Award upheld on first question and reversed on second question.

Solicitors for the corporation: *Sharpe, Pritchard & Co., agents for E. B. Gibson, Town Clerk, Sheffield.*

Solicitors for the claimant: *Corbin, Greener & Cook, agents for Arthur Neal, Scorah & Co., Sheffield.*

J. W. H.

BRUCE *v.* ODHAMS PRESS, LIMITED.

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Jan. 13, 14;
Feb. 7.

[1935. B. 3481.]

Defamation—Libel—No specific reference to plaintiff—Particulars of allegation that certain words referred to plaintiff.

The defendants published an article in a newspaper published by them in which they referred to certain aeroplane smuggling exploits of "an Englishwoman." The plaintiff brought a libel action against the defendants, and in her statement of claim she alleged that the words "an Englishwoman," "she," and "her," in the article, referring to the woman who was alleged to have been guilty of plane smuggling, meant the plaintiff, but the plaintiff was not identified in the article by name or description as the woman referred to. The defendants applied for an order for particulars of the allegation that the words complained of referred to the plaintiff. The Master made an Order that the plaintiff should deliver to the defendants particulars of the allegation in the statement of claim, that the words complained of were published of the plaintiff, and that "Englishwoman," "she," and "her," in the words meant the plaintiff, stating the facts from which it was to be inferred that the words were published of the plaintiff and that the said specific words meant the plaintiff. The Judge in Chambers reversed the Order of the Master. On appeal:—

Held, that the material facts on which a plaintiff must rely in a libel action necessarily included the facts and matters from which it was to be inferred that the words were published of the plaintiff. Without a statement of those facts and matters it was impossible for the defendants to be in a position to decide how to plead to the statement of claim. The matters and facts referred to in the Order of the Master were material facts on which the plaintiff relied as a matter of necessity in support of her allegation that she was defamed by the article in question, and under the provisions of Order XIX., r. 4, such facts ought to have been stated in the statement of claim, and if not so stated the defendants were entitled to have further particulars of the allegation that the words referred to the plaintiff.

APPEAL from a decision of Lewis J. sitting in Chambers.

The plaintiff, Mildred Mary Bruce (wife of The Hon. Victor Bruce) was, and was well known as, an airwoman holding a pilot's licence, and an expert in matters of aviation.

The defendants, Odhams Press, Ld., were the printers and publishers of a weekly newspaper entitled The People, which had a large circulation in the United Kingdom.

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The plaintiff brought an action against the defendants for libel contained in The People published on September 8, 1935.

The plaintiff by para. 3 of her statement of claim alleged that " In the issue of the said newspaper dated September 8, 1935, the defendants falsely and maliciously printed and published or caused to be printed and published of the plaintiff the following words :—

'PLANE SMUGGLING.

'THE NEW RACKET.

'And it was an Englishwoman' (thereby meaning the plaintiff) 'who started it.

'Plane-running is the latest smuggling "racket" and Abyssinia offers a ready market for those engaged in it.

'The process is a simple one. Owing to the country's failure to sign the Arms Convention, armaments cannot be exported from Britain to Abyssinia except under licence from the Foreign Office, and this has always been refused.

'This embargo applies to warplanes exported from this country. There is, however, no ban on aircraft intended for commercial purposes.

'Taking advantage of this fact a number of machines have been shipped as commercial planes to some neutral country. There a trusted agent proceeds to make the necessary alterations, and in a few hours the machines have been converted into effective bombers and fighters. These warplanes are then transhipped from the neutral country to Abyssinia.

'This aeroplane running was started by an enterprising young Englishwoman' (thereby meaning the plaintiff) 'who began operations during the Bolivia-Paraguay war in South America.

'By means of a number of aliases, she' (thereby meaning the plaintiff) 'bought up all the second-hand aircraft and their component parts that were on the market.

'Her' (thereby meaning the plaintiff's) 'problem was to find secret storage space for these aircraft, and ultimately she' (meaning the plaintiff) 'used the vaults of a disused church in the southern counties.

'There the machines were stored until they were ready for shipment to a South American port, either as commerical aircraft or in their component parts.

'In this way she' (thereby meaning the plaintiff) 'was able to evade the embargo.'"

By para. 4 of the statement of claim the plaintiff alleged that by the said words the defendants meant and were understood to mean that the plaintiff had been constantly engaged for some time past in committing criminal offences by secretly and illegally exporting munitions of war—namely, aircraft, assembled or dismantled, and aircraft engines, contrary to certain specified statutes, and that her conduct in committing the said offences was deserving of the severest condemnation.

On the application of the defendants the Master made an Order that the plaintiff should within fourteen days deliver to the defendants particulars in writing of the allegation in para. 3 of the statement of claim, that the words complained of were published of the plaintiff, and that "Englishwoman," "she," and "her," in the said words meant the plaintiff, stating the facts and matters from which it was to be inferred that the words were published of the plaintiff, and that the said specific words meant the plaintiff, and that the plaintiff should have leave to supplement these particulars at any time up to twenty days before the trial of the action.

The plaintiff appealed from the Order of the Master to the judge in Chambers, who allowed the appeal.

The defendants appealed from the decision of the Judge in Chambers.

Valentine Holmes for the appellants. The defendants are entitled to the particulars which were ordered by the Master, as they are necessary and desirable in order that the defendants may be in a position to decide what their defence to the action should be. The only question in the case is one of identity. Particulars of the kind asked for were ordered in *Youssopoff* v. *Metro-Goldwyn-Mayer Pictures*. (1)

It is most unusual for a statement of claim in a libel action

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(1) (1934) Unreported.

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to omit all the facts and circumstances from which it can be inferred who was meant. These facts ought to have been set out in the statement of claim originally as was done in *Jones* v. *E. Hulton & Co.* (1)

Cotton L.J. in *Philipps* v. *Philipps* (2) said that "it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial." That directly applies in the present case. The defendants here are not asking for the evidence but for particulars of the facts upon which the plaintiff relies.

[SLESSER L.J. referred to *Ratcliffe* v. *Evans.* (3)].

St. John Field for the respondent. If these particulars are ordered it will amount to ordering the plaintiff to state the evidence by which the material facts upon which she relies are to be proved, and will be an infringement of Order XIX., r. 4, of the Rules of the Supreme Court. Under that rule "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim . . . . but not the evidence by which they are to be proved." Therefore the plaintiff must plead that the words complained of were spoken of her but need not plead anything more. The statement of claim sets out sufficiently the case the defendants will have to meet at the trial.

[GREER L.J. In *Philipps* v. *Philipps* (4) Bramwell L.J. said: "The object of the rules is threefold. It is that the plaintiff may state what his case is for the information of the defendant, and that the plaintiff may be tied down to it and not spring a new case on the defendant; secondly, that the defendant may be at liberty to say, that the statement is not sufficient in point of law, and to raise the point on demurrer; and thirdly, that the defendant, instead of being driven to deny everything by an ambiguous and uncertain statement involving conclusions of law as well as actual facts, and so going down to try an expensive issue, may be at liberty to single out any one statement, and to answer it."]

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(1) [1909] 2 K. B. 444; In H. L. [1910] A. C. 20.

(2) (1878) 4 Q. B. D. 127, 139.

(3) [1892] 2 Q. B. 524, 532.

(4) 4 Q. B. D. 127, 131.

The defendants know that the plaintiff will call witnesses who will say that they have read the libel and thought it referred to the plaintiff. What the defendants are asking for by their application is that the plaintiff shall state the reasons why the witnesses have come to that conclusion. The defendants are asking for these particulars under Order XIX., r. 7B., but they have not put in a defence yet, and by that rule "particulars of a claim shall not be ordered under r. 7 to be delivered before defence unless the Court or judge shall be of opinion that they are necessary or desirable to enable the defendant to plead." Nevertheless the defendants want the plaintiff to state the facts from which it is to be inferred that the libel referred to the plaintiff. In the days of strict pleading before the passing of the Judicature Act, 1873, the plaintiff was never required to set out the facts proving the introductory averments: *Bourke* v. *Warren*. (1)

[SLESSER L.J. It is stated in Bullen & Leake's Precedents of Pleading, 3rd ed., p. 304, that "the declaration must state that the words were spoken, or the libel was written 'of the plaintiff,' unless the matter itself spoken or published manifestly pointed out and applied to the plaintiff; otherwise the count would be bad even on error." The question then arises whether the circumstances are set out in the statement of claim in the present case with sufficient particularity.]

In *Clement* v. *Fisher* (2), which is cited as an authority for that proposition, the second count was held to be bad because it did not repeat the words "of and concerning the plaintiff." If the words used were innocent in their natural meaning and actionable only in consequence of the peculiar meaning conveyed by them on the particular occasion it was necessary to add an innuendo or statement of the meaning intended by the words. It was formerly necessary to insert in the declaration, by way of inducement, a prefatory averment of the meaning of the words, and then by innuendo to allege

(1) (1826) 2 C. & P. 307.

(2) (1827) 7 B. & C. 459.

that they were used to convey that meaning: see *O'Brien* v. *Clement.* (1) Prefatory averments were abolished by s. 61 of the Common Law Procedure Act, 1852.

[Slesser L.J. It is stated in Gatley on Libel and Slander, 2nd ed., p. 536, that "the defendant is entitled to particulars of any prefatory averment in the statement of claim which, whether necessary or not, is not immaterial for the purposes of the plaintiff's case."]

There never was a prefatory averment as to the meaning of the words "of and concerning the plaintiff," but only as to the meaning of the words alleged to constitute the libel. It was held in *Le Fanu* v. *Malcomson* (2), that though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter. In the present case every fact required by Order xix., r. 4, has been pleaded—namely, the libel and the allegation that it referred to the plaintiff. It is very remarkable that there is no report of an application such as this one, asking for particulars of the allegation that the words complained of were published of the plaintiff, having been made to the Courts. That is a matter of evidence for the jury. If the present application is right, plaintiff's counsel in a libel action would have to have proofs of all his witnesses before drawing the statement of claim. In the *Youssopoff* case (3) plaintiff's counsel offered to give the particulars which are now asked for. Where a libel does not on the face of it refer to the plaintiff some extrinsic evidence must be given to connect the libel with the plaintiff. It is neither necessary nor desirable to apply for particulars before the issues to be tried are fixed. *Palmer* v. *Palmer* (4) and *Cassidy* v. *Daily Mirror Newspapers, Ld.* (5) were also cited.

Valentine Holmes in reply. This statement of claim is

(1) (1846) 16 M. & W. 159.
(2) (1848) 1 H. L. C. 637.
(3) Unreported.
(4) [1892] 1 Q. B. 319.
(5) [1929] 2 K. B. 331.

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unprecedented and therefore this application for particulars is also without precedent. The particulars which used formerly to be inserted in the prefatory averment are now put into the body of the statement of claim or into the innuendo. The defendants are not asking for particulars of the evidence by which the plaintiff will prove her case, but particulars of the facts which the plaintiff is going to prove as showing that persons knowing the circumstances would reasonably infer that the words complained of referred to the plaintiff. This statement of claim does not comply with r. 4 of Order XIX., and therefore the defendants would be entitled under r. 7 to a further and better statement of the nature of the claim. The issue to be tried is whether the words complained of could reasonably be thought to refer to the plaintiff. If it were a case in which other persons might reasonably think that the words referred to the plaintiff, the defendants might plead an apology.

Cur. adv. vult.

1936. Feb. 7. The following judgments were read:

GREER L.J. (read by SLESSER L.J.). Mrs. Mildred Mary Bruce, the respondent in this appeal, by her statement of claim alleged that she had been libelled by the defendants in an article appearing in a newspaper published by them called The People. The words of the alleged libel, which are set out in para. 3 of the statement of claim, refer to certain aeroplane smuggling exploits of "an Englishwoman," and if it be established that they refer to the plaintiff it is admitted that the statements contained in the article in question are defamatory. The plaintiff alleges in her statement of claim that the words "an Englishwoman" and the other words referring to the woman who is alleged to have been guilty of plane smuggling mean the plaintiff, but the plaintiff is not in the article identified by name or description as the woman referred to. She can only succeed in establishing her case by showing that there were some facts or circumstances which justified reasonable people who read the article in construing the words complained of as referring to her. This being the

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nature of the statement of claim, the defendants applied for an Order for particulars of the allegation that the words complained of were published of the plaintiff. The Master on that application made an Order that the plaintiff should within fourteen days deliver to the defendants particulars under para. 3 of the statement of claim of the allegation that the words complained of were published of the plaintiff and that " Englishwoman," " she," and " her," in the said words means the plaintiff, stating the facts from which it is to be inferred that the words are published of the plaintiff and that the said specific words mean the plaintiff, and he further ordered that the plaintiff should have leave to supplement those particulars at any time up to twenty days before the trial of the action. From this Order the plaintiff appealed to the judge in Chambers, who allowed the appeal, reversed the Order of the Master and gave leave to the defendants to appeal to this Court.

In my judgment the Order of the Master was right, and the judge ought not to have allowed the appeal. Though the question is only one relating to particulars and the Court of Appeal has at times been reluctant to consider and allow or dismiss appeals relating merely to particulars, we reserved our decision because the question involved in the appeal is one of principle and there has not so far been any reported case dealing with the question.

It was contended on behalf of the appellants that they were entitled to the particulars which had been ordered by the Master on the ground that they were necessary and desirable in order that they might be in a position to decide what their defence to the action should be. As far as we can ascertain, the question whether a defendant is entitled to the kind of Order which the Master made in this case has never come before the Court for decision, and it therefore becomes necessary to deal with the question involved in the appeal on principle.

I am unable to attach any importance to the rules of practice prevailing before the Judicature Act. The Rules made under the Judicature Act form a code by which we are to be guided in deciding matters of practice and procedure. The first observation that occurs to me as relevant is that it is an essential part of the cause of action of a plaintiff in cases of defamation, whether of slander or libel, that the words are defamatory of the plaintiff. If they are defamatory of some other person, real or imaginary, they do not provide the plaintiff with any cause of action at all. Defamatory statements which are in the air, as it were, and do not appear by their words to refer to the plaintiff, have got to be made referable to the plaintiff by reason of special facts and circumstances which show that the words can be reasonably construed as relating to the plaintiff. It is not sufficient under the existing rules of practice merely to allege in general terms a cause of action. Such cause of action must be alleged with particularity. For example, it would not be sufficient for a plaintiff in an action of trespass to plead " the defendant trespassed on my lands and took away and converted to his own use two of my horses " without stating particulars of the time and place when the trespass is alleged to have taken place. A plaintiff must state sufficient particulars of his alleged cause of action which will enable the defendant either to admit it or deny it or otherwise plead a defence to it. By r. 4 of Order XIX. it is provided that " every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved." The material facts on which the plaintiff must rely for her claim in the present case seem to me necessarily to include the facts and matters from which it is to be inferred that the words were published of the plaintiff. Without a statement of these facts and matters, it seems to me impossible that the defendants could be in a position to decide how to plead to the statement of claim. The matters and facts referred to in the Order of the Master seem to me to be material facts on which the plaintiff relies as a matter of necessity in support of her allegation that she was defamed by the article in question, and under the provisions of Order XIX., r. 4, such facts ought to have been stated in the statement of claim, and if not so stated the defendants are entitled to have further particulars of the bald allegation that the words referred to the plaintiff.

It was contended by Mr. St. John Field on behalf of the plaintiff that the practice before and since the Judicature Acts had always been merely to allege that the defamatory words referred to the plaintiff, and the plaintiff was not under any obligation to give particulars of the special circumstances which show that the defamatory statements referred to the plaintiff. It appears that sometimes such facts and circumstances were pleaded, as they were in the case of *Jones* v. *E. Hulton & Co.* (1)

In my judgment the facts and matters referred to in the Master's Order were material facts which the plaintiff had to allege to show that she had a cause of action against the defendants. They ought to have appeared in the statement of claim, and as they were not there the Master was justified in making the Order that he did.

Mr. Field also contended that in any event the particulars ought not to have been ordered before defence, and he cited in support of this contention r. 7B. of Order XIX., but in my judgment the particulars of claim ordered by the Master are necessary or desirable to enable the defendants to plead or to enable them to decide how to plead; they may have to decide whether they ought to deny the claim entirely, put in a complete defence to the claim, or whether they should admit and apologize and, if so advised, pay money into Court. I think the argument based on r. 7B. of Order XIX. also fails.

We were referred to a number of cases, but they do not appear to me to afford very much help in deciding the question involved in this appeal. There are, however, observations in the course of the judgments, of Bramwell L.J. and Brett L.J. in *Philipps* v. *Philipps* (2), which seem to me to be helpful. Lord Bramwell (then Bramwell L.J.) says (3): "The object of the rules is threefold. It is that the plaintiff may state what his case is for the information of the defendant." I think "may" there ought to read "shall." The observation of Brett L.J. in the same case (1) is, I think, applicable to the present case. The Lord Justice there says: "Therefore, again, in their pleadings they ought to state every fact upon which they must rely to make out their right or claim." The facts referred to in the Master's Order are certainly facts upon which the plaintiff in this case must rely to make out her claim. Mr. Field contended that the Order made by the Master was oppressive because the plaintiff could not be expected at the present time to know all the evidence that she would be able to procure in order to show facts and circumstances which justified some readers of the article in interpreting it as defamatory of the plaintiff. This difficulty is partly provided for by the words of the Order that the plaintiff should have leave to supplement the particulars at any time up to twenty days before the trial of the action, but we think it fair that the Order should contain the further words "or at such later time as may be ordered by the Court or a judge or at the trial on such terms as may be deemed just." The addition of these words ought to make no difference to the result of this appeal. The appeal should be allowed with costs, but with a direction that those words should be added to the order. The appellants should also have the costs of the appeal to the judge in Chambers.

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(1) [1909] 2 K. B. 444. In H. L. [1910] A. C. 20.

(2) 4 Q. B. D. 127.

(3) Ibid. 131.

SLESSER L.J. By Order XIX., r. 4, it is provided that "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim, or defence, as the case may be, but not the evidence by which they are to be proved"; and the question which arises in the present case may shortly be put thus: whether it is sufficient in a statement of claim for defamation in which the defamatory matter does not mention the plaintiff at all, merely to insert after the words, "it was an Englishwoman"—the words "thereby meaning the plaintiff." As has been pointed out by Greer L.J., the question of the degree of particularity which the defendant

(1) 4 Q. B. D. 133–4.

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may demand in such a case has not been the subject of recent judicial decision. In the case of *Youssopoff* (1), in which the plaintiff claimed damages for an alleged libel contained in a sound film alleging that the defendants had published in the film pictures and words which were understood to mean that she, therein called "Princess Natasha," had been seduced, Sir Patrick Hastings for the plaintiff on an interlocutory appeal agreed to give particulars as to the reasons why the plaintiff was to be identified with the Princess Natasha, and in some cases, such as *Jones* v. *E. Hulton & Co.* (2), the circumstances in which it was said that the defamatory statements would be understood to convey a meaning defamatory of the plaintiff in the circumstances were pleaded.

In such a case as the present, the plaintiff, not being actually named in the libel, will have to prove an innuendo identifying her in the minds of some people reasonably reading the libel with the person defamed, for there is no cause of action unless the plaintiff can prove a publication of and concerning her of the libellous matter: see per A. L. Smith M.R., in *Sadgrove* v. *Hole.* (3) And such innuendo, being essential to the plaintiff's case, seems to me to fall within r. 4 of Order XIX., as being a statement of the material facts on which the party pleading relies, without which no cause of action is disclosed. The earlier cases as to the particularity with which an innuendo must be pleaded were concerned rather with the meaning of the defamatory matter itself in some secondary sense, than with the problem whether the person defamed would be understood to be the plaintiff and in such cases the extraneous facts which made a statement, ex facie innocent, defamatory had to be pleaded. It was formerly necessary to insert in the declaration by way of inducement a prefatory averment of the meaning of the words and then by the innuendo to allege that they were used to convey that meaning; the averment containing the necessary particulars. But after the abolition of the necessity of preliminary averment and facts and the colloquium necessary to support the innuendo had been effected, nevertheless, though evidence be no longer pleaded, the need for assigning a special meaning by innuendo with sufficient particularity remains.

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(1) Unreported.

(2) [1909] 2 K. B. 444. In H. L. [1910] A. C. 20.

(3) [1901] 2 K. B. 1, 4.

In *Clement* v. *Fisher* (1), on a count that the defendant published of the plaintiff libellous matter without alleging that it was matter of and concerning the plaintiff, Lord Tenterden C.J. said (2): "Such an allegation would not have been necessary if there had been in the libel set out anything which clearly applied to the plaintiff . . . . it seems to me quite impossible to say that it has any relation to the plaintiff . . . . There is no averment that the particular matter is of and concerning the plaintiff, or any innuendo shewing that it related to the plaintiff."

With the extension of the possibility of innuendoes as to words said to be interpretable by some as concerning the plaintiff, encouraged by such decisions as *Jones* v. *E. Hulton & Co.* (3), and *Cassidy* v. *Daily Mirror Newspapers, Ld.* (4), the question of particularity in pleading such innuendoes may become as important as the older learning on the colloquium and innuendo to be attached to the defamatory matter itself. But in principle, the general rule as stated by Cotton L.J., in *Philipps* and *Philipps* (5), that, "it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial," and the passage from Bowen L.J., in *Ratcliffe* v. *Evans* (6), that "as much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances" have only to be applied to the present case to result in the need for the particulars here sought becoming apparent.

I agree that this appeal should be allowed and the Order varied as stated by Greer L.J.

SCOTT L.J. In this appeal I should have been content

(1) 7 B. & C. 459.
(2) Ibid. 462.
(3) [1909] 2 K. B. 444; In H. L. [1910] A. C. 20.
(4) [1929] 2 K. B. 331.
(5) 4 Q. B. D. 139.
(6) [1892] 2 Q. B. 524, 532.

simply to express agreement with the judgments already delivered, which I have had the advantage of perusing, but that it seems to me to raise important questions of principle in regard to pleading and the correct interpretation of the leading rules of Order XIX., upon which I prefer to express my reasons and conclusions in my own way.

The appeal is from a refusal to order particulars asked for by the defendants under r. 7 of Order XIX., and as the granting or refusing of such an application is very often a matter of pure discretion with which this Court would not interfere, it is necessary to determine whether that is the case here or whether the learned judge acted upon some erroneous view of the law. The appellants submit that he did, and put their case thus: "The statement of claim sets forth a libel with adequate innuendoes as to its meaning; but there is no innuendo fastening the libel on the plaintiff; the words quoted contain no reference whatever to the plaintiff express or implied; the lady referred to may be purely fictitious; and there is nothing in the statement of claim to identify the lady of the libel with the plaintiff. The absence of any such link makes the statement of claim defective on two grounds, first, that it discloses no cause of action vested in the plaintiff, and secondly that on the issue of identification it gives the defendants no information as to the case they will have to meet at the trial. On the first ground we submit that under the old pre-Judicature Act practice the declaration would have been demurrable, because it contained no averment of extrinsic facts from which it could be inferred that the libel was in reality directed against the plaintiff, or alternatively that it would be so interpreted by persons knowing those facts. For the same reasons we say that the statement of claim is under the present system lacking in a statement of material facts within the meaning of Order XIX., r. 4, which is essential to the cause of action, and that therefore it was liable to be struck out under Order XXV., r. 4, as was done in *Philipps* v. *Philipps* (1); or a further and better statement of the nature of the claim might have been ordered under

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(1) 4 Q. B. D. 127.

Order XIX., r. 7. On the second ground we submit that the omission of this link is a transgression of the modern rule that, however concisely expressed a statement of claim may be, it must contain sufficient information to put the defendant on his guard as to the case he will have to meet at the trial—as in the various specific causes of action mentioned for purposes of illustration in r. 6. Where there is an omission from the statement of claim of averments needed for the protection of the defendant, there is a default under r. 6, and the defendant is entitled ex debito justitiæ to an order for proper particulars under r. 7. Thus under either head the issue is appealable and not a matter of discretion. The defendants might have proceeded on the lines of (1.), but are content to have particulars under (2.)."

For the respondent, the plaintiff in the action, it was contended before us (1.) that the words in the statement of claim "published of the plaintiff" were a sufficient statement of the material fact, and (2.) that to demand the addition of averments, whether in the statement of claim or by way of particulars, identifying the lady of the libel with the plaintiff would be to transgress the inhibition of r. 4 against pleading evidence.

The determination of the appeal, which was well argued on both sides, involves a careful consideration of Order XIX., and especially of the true meaning of "statement of material facts" under r. 4 and of "particulars" under r. 6. That Order draws no express line of demarcation between the two, and I am not sure that in some of the judgments in the reported cases the distinction between the two has always been kept as clear as is desirable; but it is beyond question that there is a radical distinction, and none the less so that in cases near the dividing line there is a penumbra where the two may and often do overlap, just as between night and day there is a zone of doubt which we call dusk.

Many of the pre-Judicature Act decisions were cited to us. They are relevant as, within the limits of any issues raised by the present case, the Judicature Acts effected no change in the substance as distinct from the forms of pleading.

Order XIX., r. 4, lays down the fundamental rules for framing a statement of claim, but they are based on the old principles of law and pleading as applied by the Common Law Courts both before and after the Common Law Procedure Acts; and Bullen & Leake's, 3rd ed., published in 1868, is still the best guide for the pleader on all such questions of principle. The new rules of pleading introduced by and under the Judicature Acts did not release a plaintiff from his obligation to "declare" a legally complete cause of action in his statement of claim.

But the Rules of the Supreme Court, as Greer L.J. has pointed out, now constitute, within the framework of the Judicature Acts, a complete Code of pleading, and I think the present case can and should be decided upon the phraseology of the Code, referring to the earlier position and decisions only if and so far as necessary to elucidate some point of ambiguity in the language of its provisions.

The cardinal provision in r. 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" fact is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under Order XXV., r. 4: see *Philipps* v. *Philipps* (1); or "a further and better statement of claim" may be ordered under Order XIX., r. 7.

The function of "particulars" under r. 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim—gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish between a "material fact" and a "particular" piece of information which it is reasonable to give the defendant in order to tell him the case he has to meet; hence in the nature of things there is often overlapping. And the practice of sometimes putting particulars into the statement of claim and sometimes delivering them afterwards either voluntarily, or upon request or order, without any reflection as to the true legal ground upon which they are to be given has become so common that it has tended to obscure the very real distinction between them.

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(1) 4 Q. B. D. 127.

In a case where there is no omission of material facts under r. 4, whether particulars should be ordered is very often a matter of pure discretion—because it depends on a view of fairness or convenience which is essentially a matter of degree. But where particulars are asked because the statement of claim is defective in that it omits some essential averment—i.e., some "material fact," the question is not one of discretion, and the adoption by the defendant of the lenient remedy of an application for particulars instead of the more stringent remedy of striking out does not turn an issue of right into an issue of discretion. As *Philipps* v. *Philipps* (1) is an illustration of the more stringent remedy, so *Palmer* v. *Palmer* (2) is an illustration of the more lenient remedy; but if in the latter case the defendant had so chosen I think he would have been entitled to the more drastic remedy.

In the present case if it be assumed that the words contained in para. 3 of the statement of claim "published of the plaintiff" are an insufficient statement of material facts within r. 4, the defendants might have applied under Order XXV., r. 4, to strike out the statement of claim as disclosing no cause of action, or taken a middle course by applying under Order XIX., r. 7, for "a further and better statement of the nature of the claim," and in either case would have been entitled as of right to the order as asked. But plaintiffs are so often in practice allowed to cure an

(1) 4 Q. B. D. 127.

(2) [1892] 1 Q. B. 319.

omission to state some "material fact" in the statement of claim by delivering particulars, that the fact that the defendants here asked for particulars instead of adopting either of the above two courses ought not to prejudice their rights; it does not convert an issue of right into a mere exercise of discretion. None the less I think it would tend to promote good pleading if particulars were less used—or abused—as a cover for the omission of "material facts" which ought to have been plainly stated, and if in the future on the hearing of applications parties who attack a statement of claim on the ground that it does not state all "material facts" were called upon to make the proper application rather than merely ask for particulars.

This being the law of pleading as I think it now stands under the Code, it remains to consider whether either of the answers put forward on the part of the respondent, as stated above, is sound. As regards the first, under the old law I think it clear that a declaration not identifying the plaintiff in terms would have been held bad; and that the mere insertion of the words "published of the plaintiff" would not have been regarded as sufficient averment: an averment of facts from which the general public or at least some particular persons or class of persons to whom the libel was published would have understood the plaintiff to be intended, with an appropriate innuendo applying the libel to the plaintiff in the light of those facts would have been requisite. I agree with the view expressed in Mr. Gatley's book, 2nd ed., p. 522. It is directly supported by the decision in *Fisher* v. *Clement* (1), where the declaration alleged that the libel was "published of and concerning the plaintiff," a verdict of 30*l.* damages was found for him, and judgment was entered accordingly, but on a writ of error the Court of King's Bench set aside the judgment on the ground that the above allegation was insufficient, there being no innuendo that the matter of the libel related to the plaintiff.

But if this statement of claim would have been bad in the old days, it is equally so now. Mr. Field, I am sure, did not

(1) 7 B. & C. 459.

intend to contend that the omission of a necessary averment could be cured by evidence at the trial: but unless he did, his point about evidence is no answer to the defendants' contention that they are entitled as of right to particulars "of the facts and matters from which it is to be inferred that the words were published of the plaintiff," etc., following the words of their application.

And even if the defendants' application for particulars be considered on the alternative footing of r. 6—that the information was required in justness and fairness to the defendants in order to put them on their guard as to the case they will have to meet—I still think that the kind of information for which they ask is essential to enable them to prepare for trial, and is therefore a matter of right and not of discretion. The argument about evidence is irrelevant; the rule merely forbids the pleading of evidence which does not constitute a "material fact" or "particulars."

For the above reasons I think this appeal should be allowed, the Order of the Master restored and that the appellants should have the costs of the two appeals and the costs before the Master with a certificate for counsel in any event.

Appeal allowed.

Solicitors for appellants: *Lewis & Lewis.*
Solicitors for respondent: *Kenneth Brown, Baker, Baker.*

R. F. S.

JOHN LANE THE BODLEY HEAD, LIMITED, AND ANOTHER v. ASSOCIATED NEWSPAPERS, LIMITED.

1936
Jan. 31;
Feb. 14.

[1935. J. 1641.]

Copyright—Infringement—Publication by newspaper of colourable imitation of copyright story—Defence—"No reasonable ground for suspecting that copyright subsisted in the work"—Construction—Damages for infringement and conversion—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 6, 7, 8.

1936

JOHN LANE
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The defendants published in a newspaper of which they were the proprietors and publishers a short story called "The Gods Decide," which had been submitted to them by one S. as his own original work. "The Gods Decide" was in fact a colourable imitation of a short story entitled "The Interlopers," the copyright in which was owned by the plaintiffs or one of them. The defendants did not know of the existence of "The Interlopers," nor that it was the subject of copyright, and sought to rely on s. 8 of the Copyright Act, 1911, as a defence to the plaintiffs' claim for damages under ss. 6 and 7:—

Held, that s. 8 afforded no defence in the circumstances. The defendants had not proved that they were "not aware and had no reasonable ground for suspecting that copyright subsisted in the work," but only that they had the authority of S., whom they believed to be the owner of the copyright.

Byrne v. *Statist Co.* [1914] 1 K. B. 622 applied.

ACTION tried by du Parcq J.

The plaintiffs, John Lane The Bodley Head, Ld., and Charles Arthur Munro, alleged that they were at all material times the joint owners, or alternatively that one or the other of them was the owner, of the copyright in an original work of fiction called "The Interlopers," published by the plaintiffs, John Lane The Bodley Head, Ld., in a volume entitled "The Complete Short Stories of Saki" by one H. H. Munro deceased. [At the trial it was established that the plaintiff Charles Arthur Munro was in fact the sole owner of the copyright in "The Interlopers."]

The defendants, Associated Newspapers, Ld., were the proprietors and publishers of a daily evening newspaper known as the Evening News. The plaintiffs alleged that on July 15, 1935, the defendants published in the Evening News a story entitled "The Gods Decide," written by one Hector Allan Smith, which was a colourable imitation of "The Interlopers." Mr. Smith was named as a defendant in the writ, but had not been served.

The plaintiffs claimed that the whole of every copy of the Evening News containing "The Gods Decide" or alternatively the sheet on which the story was printed in each copy was the property of the plaintiffs, and that the defendants had converted the same. Alternatively they pleaded that the defendants had received to the use of the plaintiffs the sums received from the sale of copies of the Evening News containing "The Gods Decide" or so much thereof as was attributable to such part of each copy as was the property of the plaintiffs. They claimed damages for infringement of copyright under s. 6 and damages for conversion under s. 7 of the Copyright Act, 1911.

The defendants in their pleading traversed the plaintiffs' allegations, but at the trial they admitted the infringement of copyright, and relied on a paragraph of their defence in these words:—

"At the date of the alleged infringement the defendants were not aware and had no reasonable ground for suspecting that copyright subsisted in any work of which the copyright was infringed by the printing and publication of the story 'The Gods Decide.' . . . . The defendants will rely on s. 8 of the Copyright Act, 1911." (1)

H. C. Leon and *C. H. C. Haslam* for the plaintiffs. Sect. 8 does not apply to cases where there is a guilty infringement by any one. "The work" includes every imitation or infringing copy of the work, and for the purpose of determining whether the defendants were not aware and had no reasonable ground for suspecting that copyright subsisted "in the work" "The Interlopers" and "The Gods Decide" were on the same footing. The defendants clearly believed that "The Gods Decide" was a copyright work by Allan Smith. When it turned out to be a colourable imitation of "The Interlopers," the position was not that the defendants were not aware that copyright subsisted in the work, but that they had been mistaken as to the ownership of the copyright which they knew existed. That was not sufficient: *Byrne* v. *Statist Co.* (2)

(1) The Copyright Act, 1911, s. 8: "Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction . . . . in respect of the infringement if the defendant proves that, at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work."

(2) [1914] 1 K. B. 622, 628.

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John Lane The Bodley Head, Ld. v. Associated Newspapers, Ld.

In any event, s. 8 affords no answer to the claim for damages under s. 7.

W. T. Monckton K.C. and *Valentine Holmes* for the defendants. "The work" referred to in s. 8 is the original work. The defendants had never heard of "The Interlopers." A fortiori they were not aware and had no reasonable ground for suspecting that copyright subsisted in "The Interlopers." To hold that "the work" included the infringing copies would practically deprive innocent infringers of the protection of s. 8.

As to the measure of damages in conversion they cited *Green* v. *Farmer* (1); *Reid* v. *Fairbanks* (2); *Birn Bros., Ld.* v. *Keene & Co., Ld.* (3); *Peruvian Guano Co., Ld.* v. *Dreyfus Bros. & Co.* (4); and Mayne on Damages, 10th ed., pp. 378 sqq.

Cur. adv. vult.

1936. Feb. 14. du Parcq J. The plaintiffs in this action are a firm of publishers and the executor of the late Hector Munro, who during his lifetime wrote many works of undoubted literary merit under the name of "Saki." The defendants are the proprietors of the Evening News, a newspaper with a very large circulation. Some time before his death in action in 1916 Mr. Munro wrote a short story called "The Interlopers." It was first published in a weekly paper, and after his death was in 1919 included in a volume of short stories entitled "The Toys of Peace," and in the year 1930 in another volume containing the "Complete Short Stories" of "Saki." On May 30, 1935, one Hector Allan Smith submitted to the editor of the Evening News a short story entitled "The Gods Decide." The editor believed that it was a piece of original work by Allan Smith and it was accepted and paid for, and on July 15, 1935, appeared, appropriately illustrated, in that day's issue of the Evening News.

Counsel admitted on behalf of the defendants that by publishing "The Gods Decide" they infringed the copyright in "The Interlopers" and further admitted that the plaintiff Munro was the owner of that copyright. It seems clear that the plaintiffs, John Lane The Bodley Head, Ld., are not the owners of the copyright. It was agreed that any discussion as to the propriety of joining the company as plaintiffs should be deferred until the question of costs came to be considered. I should add that Allan Smith was joined as a defendant, but was not before the Court, as the writ was never served upon him. In his absence, I shall say as little about him as possible. The plaintiffs do not ask for an injunction, but first for damages for infringement of copyright under s. 6 of the Copyright Act, 1911, and secondly for damages for conversion, on the footing that the infringing copies published were the property of the owner of the copyright, under s. 7 of the same Act.

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(1) (1768) 1 W. Bl. 651; 4 Burr. 2214.

(2) (1853) 13 C. B. 692.

(3) [1918] 2 Ch. 281.

(4) [1892] A. C. 166.

The defendants sought to rely on s. 8 of the Act as a complete answer to the claims for damages under ss. 6 and 7. The first question which I have to decide is whether in the circumstances of this case s. 8 provides a defence against the whole or any part of the plaintiffs' claim. The learned pleader who settled the defence did not adhere closely to the words of the section, but pleaded in these terms: "the defendants were not aware and had no reasonable ground for suspecting that copyright subsisted in any work of which the copyright was infringed by the printing and publication of the story entitled 'The Gods Decide.'" The defendants contended that s. 8 must be read as meaning that where proceedings are taken in respect of the infringement of the copyright in an original work which has been imitated, and the defendant proves that he was not aware and had no reasonable ground for suspecting that copyright subsisted in that original work, the defendant brings himself within the exemption. Then, say the defendants, how better can we prove that we had no ground for suspecting that copyright subsisted in the original work than by proving that we did not know of the existence of the original work?

The evidence has satisfied me that those persons who must be taken to represent the defendant company in this department of its activities, that is, the literary editor of the Evening News and his assistants, did not know of the existence of "The Interlopers," and did not know or suspect that "The Gods Decide" was not an original work. I am satisfied also that they had no reasonable ground for suspecting that the publication of "The Gods Decide" would constitute an infringement of copyright. The literary editor was not unacquainted with the works of "Saki." He had read many of them and published some. He did not happen to have read or heard of "The Interlopers," and those who assisted him seem also to have been in the same state of ignorance, which reflects no sort of discredit on them. It was suggested that the editor should always demand from a contributor a written assurance that the contributor was the owner of the copyright in the work which he submitted. But in my view a contributor who submits a story to the editor as suitable for publication is thereby representing that he has the right to authorize its publication, and the repetition of an assertion does not make it any the more likely to be true. It was argued at one time that an indication in the contributor's letter that he was in need of ready money ought to have aroused the suspicions of the editor, but I cannot think that the avowed poverty of an author is any ground even for suspecting that he has copied and is seeking to sell as his own the work of another. If, on the other hand, the suggestion be that the author's infringement of copyright may have been accidental or innocent, his poverty is wholly irrelevant. Notwithstanding these findings of fact, which, as far as they go, are favourable to the defendants, I am of opinion that s. 8 affords them no defence.

The argument of counsel for the defendants derives some plausibility from the accidental circumstance that in this case the story whereby copyright was infringed was a colourable imitation and not a literally exact copy of the work of "Saki." But in my view the position of the defendants is no better than it would have been if the manuscript submitted to them had been a literal transcript of "The

Interlopers." It would then, as it seems to me, have been difficult for the defendants to strain the words of s. 8 to fit this case. In my opinion, the defendants, in order to take advantage of s. 8, would have had to prove that they did not know that the work, which originally existed as " The Interlopers " and was presented to them in the guise of " The Gods Decide," was the subject of copyright. It is because " The Gods Decide " is in part the work of " Saki " that the publication of it constitutes an infringement of copyright. In my judgment the defence under s. 8 was really disposed of when, in cross-examination, the literary editor of the defendant company said: " I assumed that there was copyright in Allan Smith's story—presumably the copyright was in him." On the view which I take of the facts and of the true interpretation of the section, what was said by Bailhache J. in *Byrne* v. *Statist Co.* (1) applies equally here: " This merely amounts to saying that they supposed themselves to have the authority of the owner of the copyright, a very different thing from alleging and proving that they did not suspect that any copyright existed."

It only remains to consider to what damages the owner of the copyright is entitled. Since the decision of the Court of Appeal in *Sutherland Publishing Co., Ld.* v. *Caxton Publishing Co., Ld.* (2), the doubt as to the right of a plaintiff to recover damages under s. 7 as well as s. 6 has been resolved in the plaintiffs' favour. Taking the view I do about the defendants' plea based on s. 8, I find it unnecessary to decide the question whether in any event s. 8 could protect the defendants against the consequences of proceedings in conversion under s. 7. It appears from the transcript of the shorthand note of the judgments in the case I have just cited, that the Court of Appeal left this point open, and in the circumstances I think that nothing would be gained by any expression of opinion from me upon this vexed subject.

Counsel for the plaintiffs rightly claims to be entitled under s. 7 to the value of all infringing copies of the work at the date of the hypothetical conversion. At its highest, his claim

(1) [1914] 1 K. B. 622, 628. (2) [1936] 1 Ch. 323.

under this head is put at 2112*l.*, the amount of the gross proceeds of sale of the issue of the Evening News containing "The Gods Decide." But I gather that neither counsel nor his clients will be much disappointed if a smaller sum than that is recovered. Putting his claim at the lowest, and it may be feared at some sacrifice of principle, counsel conceded that on one view no more than 108*l.* might be awarded under this head. The latter sum represents the fraction of 2112*l.* which is proportionate to the fraction of space occupied in the Evening News by the short story in question, or rather by the short story together with its inseparable companions, the columns of news or literary matter printed on the other side of the sheet. Counsel for the defendants, on the other hand, founding himself on a passage in Mayne on Damages, 10th ed., pp. 378, sqq., and on some instructive dicta of Lord Macnaghten in *Peruvian Guano Co., Ld.* v. *Dreyfus Bros. & Co.* (1), invited me to take the view that hardly more than nominal damages should be awarded. It is plain as a matter of history that, although in strictness it does not seem to be right that the tortfeasor should take credit for expenses to which he has been put in and about converting another person's property, not only juries, with the connivance or encouragement of judges, in Courts of law, but even judges sitting alone in Courts of equity, have found means to temper the wind to the shorn lamb. On the other hand, the tendency in copyright cases in this country seems to have been to take no account of such expenditure, and it is interesting to see that the Appellate Division of the Supreme Court of South Africa, when administering an Act identical with our own, held that a person whose copyright in a book had been infringed was entitled to demand delivery of all the copies of the offending work in the possession of the person who had infringed the copyright and payment of the full price received by such person for all copies of the work which had been sold: *Braby* v. *Donaldson.* (2)

I think that I ought not to regard the expenses of producing

(1) [1892] A. C. 166, 173–177.

(2) South Africa L. R. [1926] App. Div. 337.

the newspaper as a relevant fact. It is not, however, my view that I can arrive by any exact arithmetical process at the sum which it is proper to award. Let it be granted that the plaintiffs are entitled to the full price received for the sheets containing the story "The Gods Decide"; it still does not follow that the fraction of each penny paid for the paper which is proportionate to the space occupied by "The Gods Decide" must be taken to have been paid for that story. I cannot but think that the paper was bought by many who had no intention of reading the story and by some who did not know that the paper contained a story. Others again may have paid the whole of their penny for the pleasure of reading "The Gods Decide." Taking everything into consideration, and making the best estimate (if that word be not too flattering) of which I feel myself to be capable on the evidence, I assess the damages for conversion at 50*l.*

In the recent case in the Court of Appeal, the learned Lords Justices pointed out that judges in assessing damages must be careful not to compensate a plaintiff twice over for the same loss. I see no reason in the present case to award any large sum by way of damages under s. 6. The value of the infringing copies represents a much larger sum than the owner of the copyright would have received from the newspaper proprietors for the right to print "The Interlopers" in one issue of their paper. I do not think that he has much cause for complaint left. I doubt if the value of the copyright is much affected by the publication on one day of a colourable imitation in an ephemeral form. Under s. 6 I award the sum of 5*l.*

[On the question of the joinder of the publishers, his Lordship directed that judgment should be entered for the plaintiff Munro with costs, but that the costs recoverable should not be increased by reason of the unnecessary joinder of the publishers.]

Judgment for plaintiff Munro.

Solicitors for plaintiffs: *Rubinstein, Nash & Co.*
Solicitors for defendants: *Lewis & Lewis.*

J. W. H.

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Feb. 19.

ADMIRALTY COMMISSIONERS *v.* VALVERDA (OWNERS).

Ship—Salvage—Salvage services by H.M. ships—Right to salvage—Previous contract to render such services—Validity—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 557.

By s. 557 of the Merchant Shipping Act, 1894: "Where salvage services are rendered by any ship belonging to [His] Majesty . . . . no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to [His] Majesty, supplied in order to effect those services, or for any other expense or loss sustained by [His] Majesty by reason of that service . . . ."

The owners of the motor vessel *Valverda*, being informed that the ship was on fire, made a contract in writing with the Admiralty that warships belonging to His Majesty should render salvage services. Such services, including towage, were in fact rendered :—

Held, that notwithstanding the provisions of the section set out above, it was open to the parties by a contract otherwise valid to contract out of the provisions of the section, and for the owners thereby to waive the benefit conferred on them by the section.

SPECIAL CASE stated by an arbitrator.

The appellants were the owners of the motor vessel *Valverda*, 8806 tons gross (called herein "the owners"), manned by a crew of 36 hands. On January 21, 1935, while on a voyage from Curaçao to Land's End, a fire broke out in her engine room, and an S.O.S. signal for assistance was sent out. To this signal H.M.S. *Frobisher*, a cruiser, and H.M.S. *Guardian*, a cruiser, responded, and the *Frobisher* on and from January 22 towed the *Valverda* to Bermuda, some 800 or 900 miles, arriving on February 1. On January 23 the owners in Glasgow had telephoned to the Admiralty, who informed them of the position. In the result an agreement, being the Admiralty standard form of salvage agreement, was signed on January 25 by representatives of the owners and of the Admiralty. The arbitrator found as a fact that the agreement was entered into voluntarily with full knowledge that the *Frobisher* and *Guardian* were assisting the *Valverda*. He further found that the owners in entering into the agreement made no suggestion that any distinction should be drawn between the classes of Admiralty vessels which might participate in the services. He also found that the services rendered by the salving vessels were difficult and dangerous and involved serious risk to the salving vessels.

The agreement was dated January 25, 1935. The material provisions were as follows: " 1. The Admiralty agree to use such endeavours as they or their officers may in their absolute discretion think fit to salve or assist the ship *Valverda* and her cargo and freight if any, and the Master (or owner) hereby engages the services of the Admiralty for such purposes . . . . It is hereby agreed that all the provisions of this agreement shall apply [to services already rendered] as if they had been wholly rendered after the signing of this agreement. . . . 4. The remuneration shall, if the services are successful or beneficial, consist of a reasonable amount of salvage . . . . 8. The amount of the remuneration payable under this agreement, and any other question which may arise out of this agreement, shall be referred to the sole arbitration of an arbitrator to be appointed by the committee of Lloyd's."

In addition to the *Frobisher* and *Guardian*, the following Admiralty ships also rendered services to the *Valverda*: H.M.S. *Sandboy* and H.M. yard craft *Creole*. R.F.A. *Orangeleaf* was also sent out to the *Valverda* from Bermuda with necessary apparatus to tow her if necessary and with oil to refuel her. In fact, it was found unnecessary to use the *Orangeleaf*, but she was absent from Bermuda for eight days, and the arbitrator found as a fact that it was reasonable to send her out. The *Sandboy* and the *Creole* were tugs or vessels " specially equipped with salvage plant " within s. 1 of the Merchant Shipping (Salvage) Act, 1916. (1) The *Frobisher* and *Guardian* were not within that section.

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(1) Merchant Shipping Law Amendment Act, 1853 (16 & 17 Vict. c. 131), s. 40 (in error printed as 39) (repealed by 17 & 18 Vict. c. 120 and re-enacted by 17 & 18 Vict. c. 104, s. 484). This was repealed by 57 & 58 Vict. c. 60, s. 745, and Sch. XXII., and is now re-enacted in the following section of that Act:—

Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557: " (1.) Where salvage services are rendered by any ship belonging to

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The owners admitted that salvage services were rendered to the *Valverda* by the *Frobisher, Guardian, Sandboy* and *Creole,* but denied that services were rendered by the *Orangeleaf.* They admitted that the Admiralty were entitled to claim salvage in respect of the services of the *Sandboy* and *Creole,* but denied that they were entitled to claim in respect of the *Frobisher* and *Guardian.* They admitted that the officers and crews of the four last named ships were entitled to salvage remuneration.

The Admiralty contended that by virtue of the terms of the contract of January 25, 1935, they were entitled to claim in respect of the services of all five ships.

The arbitrator held that the Admiralty was entitled to salvage in respect of all five ships and awarded 11,000*l.* In the alternative, if the Court should be of opinion that the Admiralty was not entitled in respect of the *Frobisher, Guardian* and *Orangeleaf,* he awarded 6500*l.*

The owners appealed.

Carpmael K.C. and *H. G. Willmer* for the owners. Before 1853 the Admiralty could claim salvage. In that year the Merchant Shipping Act, 1853, was passed, and s. 40 (misprinted 39) of that Act (now represented by s. 557 of the Merchant Shipping Act, 1894 (1)) enacted that no such claim should be allowed.

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(1) [See note (1), ante, page 725.]

[His] Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to [His] Majesty, supplied in order to effect those services, or for any other expense or loss sustained by [His] Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of [His] Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved."

Merchant Shipping (Salvage) Act, 1916 (6 & 7 Geo. 5, c. 41), s. 1: "Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in s. 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty."

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More than eighty years have elapsed since that Act was passed, and no claim for salvage has been brought by the Admiralty except in cases coming within s. 1 of the subsequent Act, the Merchant Shipping (Salvage) Act, 1916 (1), which is not applicable to the claim in respect of the *Frobisher, Guardian* and *Orangeleaf* in the present case. If the present contention of the Admiralty that they are entitled to claim salvage is correct, the Act of 1916 was quite unnecessary. But the Admiralty are not entitled to claim: *The Matti* (2), *The Morgana* (3); and in *The Sarpen* (4) Bankes L.J. speaks of "the disabilities, so far as salvage services are concerned, of one of His Majesty's ships." The form of agreement adopted by the parties in this case was not settled until after the passing of the Act of 1916, which would indicate that it was not required before that Act.

[BRANSON J. The question here is as to the power of the parties to make this agreement notwithstanding s. 557.]

That is the question. The parties cannot by a private agreement alter the legal position, which is one of prohibition: see Craies on Statute Law, 4th ed., p. 223. In *Philpott* v. *St. George's Hospital* (5) Lord Cranworth L.C. said: "Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that anything done that is substantially that which is prohibited, I think it is perfectly open to the Court to say that that is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing, or one of the things, actually prohibited." Sect. 557 was intended to lay down a rule of public policy and "it is impossible for [either party] to contract himself out of it or to waive its effect"—per Lord Dunedin in *Equitable Life Assurance Society of the United States* v. *Reed*. (6) It was not necessary that an agreement

(1) [See note (1), ante, pp. 725, 726.]

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(2) [1918] P. 314.

(3) [1920] P. 442.

(4) [1916] P. 306, 323.

(5) (1857) 6 H. L. C. 338, 349.

(6) [1914] A. C. 587, 595.

like this should be in writing, so that if the Admiralty's contention that one can contract out of s. 557 be correct it would only be necessary for a vessel in distress to hail one of His Majesty's ships and agree to be salved to render s. 557 inoperative. Effect can still be given to this agreement by confirming the smaller award, 6500*l.*

Pilcher K.C. (the *Attorney-General* (*Sir T. Inskip*) and *Norman Craig* with him) for the Admiralty. The question is whether the parties can contract out of s. 557. It is submitted that they can. First, as to the prohibition so to contract said to be imposed by the words of the section itself. The section does not prohibit claims for salvage services ; it only says that no claim shall be allowed in respect of a number of matters relating to the ship, its tackle and stores, which are matters taken into account in ordinary salvage cases ; but nothing is said as to the benefit conferred by the salving of property ; therefore there is no prohibition with regard to claims in respect thereof. There being no prohibition, but only legislation in favour of the salved ship, there is no reason why the owners of the latter should not waive the benefit of that legislation if they think that it is to their advantage to do so. No doubt the rate of remuneration would be less than in the case of salving ships not belonging to His Majesty—per Dr. Lushington in *The Iodine* (1) quoted by Bankes L.J. in *The Sarpen.* (2) It has been held in the case of many statutes which contain words quite as prohibitory as those of s. 557 that they can be contracted out of—e.g. the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which protects public authorities against actions brought against them more than six months after the cause of action arose. Yet public authorities have frequently waived this benefit.

[*Griffiths* v. *Earl of Dudley* (3) was referred to.]

Then this contract is said to be void as against public policy. Sect. 557 does not involve any question of public policy at all, but is only an enactment in favour of salved ships. There is another matter which should be considered—

(1) (1844) 3 Notes of Cases 140, 141.

(2) [1916] P. 306, 319.

(3) (1882) 9 Q. B. D. 357.

namely, that it is against public policy that freedom of contract should be interfered with, and this is a more important public policy than the public policy suggested.

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[*The Louisa* (1) was also referred to.]

Carpmael K.C. in reply. The Public Authorities Protection Act, 1893, is in favour of particular parties. Sect. 557 of the Act of 1894 protects public rights. An intention to contract out of the section cannot be implied, but must be in express terms.

[*Melliss* v. *Shirley and Freemantle Local Board of Health* (2). *The Mary Ann* (3) and *The Alma* (4) were referred to.]

BRANSON J. This case raises a neat point, and, so far as it applies to the particular statute in question, the Merchant Shipping Act, 1894, a new one. It comes before me upon a case stated by a learned arbitrator, Sir Norman Raeburn, and the facts, so far as they are material to my judgment, are as follows: The *Valverda* is a steel twin-screw motor tank vessel of 8806 tons, and was on a voyage from Curaçao to Land's End. On January 21, when she was in an estimated position of latitude 25.17 N. and longitude 52 W., a fire broke out in her engine room, and an S.O.S. signal was sent out for assistance. To this signal a French steamship and also H.M.S. *Frobisher* responded, and the *Frobisher* reached the ship on the morning of January 22, and proceeded to take her in tow. The fire was extinguished on the morning of January 23, but it was found that the main engines were so disabled as to be useless, and it was, therefore, decided that the *Frobisher* should tow the *Valverda* to Bermuda, some 800 to 900 miles distant. On the evening of January 23 the owners of the *Valverda* in Glasgow, who had been informed of the casualty, telephoned to the Admiralty, with the result that on January 25 the Admiralty standard form of salvage agreement was signed by a representative of the owners and a representative of the Admiralty. The learned arbitrator says in the case: "In

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(1) (1813) 1 Dod. Adm. Rep. 317.

(2) (1885) 16 Q. B. D. 446.

(3) (1823) 1 Hagg. Adm. Rep. 158.

(4) (1861) Lush. 378.

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case it should be material I find as a fact that the said agreement was entered into voluntarily on behalf of the owners, and with full knowledge that the Admiralty ships *Frobisher* and *Guardian* were already on the spot and assisting the *Valverda*. I further find as a fact that the owners of the *Valverda* in entering into the said agreement made no suggestion that any distinction should be drawn between the classes of Admiralty vessels which might participate in the services." The *Valverda* was safely taken to Bermuda by the Admiralty ; she was towed for a distance of about 900 miles, and in the services rendered to her there participated H.M.S. *Frobisher*, a cruiser, H.M.S. *Guardian*, another cruiser, H.M.S. *Sandboy*, a tug, and H.M. yard craft *Creole*.

The learned arbitrator has under this agreement awarded certain salvage to the Lords Commissioners of the Admiralty, basing that upon the assumption that he had to take into consideration not only the services rendered by the personnel on board these various ships of His Majesty, but also the ships themselves, and the damage received by the ships, the gear that was used and the fuel consumed, and so on. Finding that under the agreement the Admiralty were entitled to salvage on that basis, he assessed the remuneration at 11,000*l.*

Before the arbitrator the question was raised whether he was entitled to consider the whole of that material, or whether he was not bound to consider only the services rendered by the personnel of all the ships concerned, and the expenses, stores and articles which were used or damaged by the two ships, the *Sandboy* and the *Creole*. He held that if the Admiralty were not entitled to salvage remuneration in respect of the services of the *Frobisher*, the *Guardian* and the Royal Fleet auxiliary the *Orangeleaf*, which was sent out with oil, then the amount of salvage should be reduced to 6500*l.* The owners of the *Valverda* being dissatisfied with that award have come to this Court.

It seems to me the first question which arises for my decision is whether, on the true construction of the agreement, supposing it to be an agreement into which it was open for the parties to enter, the learned arbitrator was right or wrong.

The only point upon which it is suggested he has gone wrong in the construction of the agreement is that it is said that the remuneration which was provided for under that agreement was to be a reasonable amount of salvage, and that the reasonable amount of salvage must be calculated having regard to the fact that under s. 557 of the Merchant Shipping Act, 1894, no claim is to be allowed " for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to [His] Majesty, supplied in order to effect those services," and that, therefore, the learned arbitrator was wrong in taking into consideration, as obviously he did, the coal expended by these two of His Majesty's ships, the *Frobisher* and the *Guardian*, and the stores and the value of the gear used and lost in rendering the salvage services. It seems to me that that point really begs the question. Treating the agreement as an agreement entered into between two parties sui juris and construing it according to the meaning of the language used without reference to anything else, it seems to me that the arbitrator has arrived at a perfectly correct conclusion. It is plain that the parties meant the agreement to apply to the services which were being rendered, as they knew, by two of His Majesty's ships which, apart from this agreement, would find their claims for salvage either altogether barred or, at all events, circumscribed by s. 557 of the Merchant Shipping Act, 1894, they being ships to which the definitions of the Merchant Shipping (Salvage) Act, 1916, did not apply, and it seems also to follow that the circumstances which would have governed the situation apart from the agreement were intended by the parties to be altered. I think if this agreement was one into which parties, sui juris and acting voluntarily, as these parties are found to have acted, were competent to enter, the award made by the learned arbitrator was correct.

That brings me to the second question which was raised. It was argued that this class of agreement is one which is prohibited under s. 557 of the Merchant Shipping Act, 1894, and it is said also that if it is not in words prohibited, it is, at all events, shown to be contrary to public policy by that section of that Act. With regard to the actual words of that section, they are, as far as is material, as follows: "Where salvage services are rendered by any ship belonging to [His] Majesty . . . . no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to [His] Majesty, supplied in order to effect those services, or for any other expense or loss sustained by [His] Majesty by reason of that service." I think in order to understand the section properly it is necessary to look at the history of the position with regard to salvage services rendered by His Majesty's ships. That history was shortly and, as it seems to me, with great respect, accurately stated, by Bankes L.J. in the case of *The Sarpen* (1), and the way in which the Lord Justice puts it is this. He says (1): "The rule restricting any claim for salvage by a vessel belonging to [His] Majesty appears to be of very old standing"—I draw attention to the word "restricting," not "prohibiting." He goes on: "It was referred to in the case of *The Iodine* (2) by Dr. Lushington in the year 1844 in the following terms: 'Observations have been made in the argument respecting one of Her Majesty's vessels preferring a claim of this nature. I thought that question had long ago been settled; for from the very earliest date of my experience as an advocate, as far back as 1808, I thought the opinion expressed by Lord Stowell had decided this question. I apprehend that where assistance is rendered by any vessel belonging to Her Majesty, the following principles are to be applied: that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of owners under these circumstances never being risked'."

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(1) [1916] P. 306, 319.

(2) 3 Notes of Cases 140, 141.

Bankes L.J. goes on to say: "Ten years later the rule as extended was incorporated in the Merchant Shipping Act, 1854 (ss. 484, 485)." Mr. Carpmael suggested that something must have gone wrong with that report, but, on the contrary, it seems to me that the Lord Justice, with his usual accuracy, has completely expressed the position, and that, in fact, s. 557 of the Merchant Shipping Act, which now represents ss. 484 and 485 of the Act of 1854, does not bar every claim, but it simply says that certain matters shall not be taken into consideration in any such claim.

Now it seems to me that it would be pushing matters to a quite impossible extreme to say that the statute, which does not bar all claims on behalf of His Majesty's ships for salvage, but only says that certain points should not be considered in assessing them, has set up some doctrine of public policy which prohibits any person from entering into an agreement to contract out of it, or which, to put it in a slightly different, and perhaps more apposite, way, prohibits persons from so contracting as to take on themselves liabilities which, without such a contract, they would not under that section have been obliged to incur. Public policy has been said to be a difficult horse to ride. When one gets questions in which public policy is concerned, it is necessary to ride warily, and when it so happens that there is not only one question of public policy but two involved, the difficulty of the equestrian feat becomes one which only a circus rider could surmount satisfactorily. It has been said, not once but many times, to be a cardinal principle of public policy that the freedom of contract between persons sui juris should not be held to have been interfered with, unless the statute which is said to interfere with it, does so in express and unequivocal terms. That, at all events, is a doctrine of public policy as to which there can be no doubt. If I am asked if it is true to say that s. 557 involves any question of public policy at all, which of these two principles has got to give way, I should unhesitatingly say that the principle that you do not so construe an enactment as to interfere with the capacity of persons sui juris to contract freely with each other is one which must override the question whether it is public policy that in a claim by the Admiralty certain elements which are taken into consideration in an ordinary claim for salvage shall be left out. I do not think, as a matter of fact, s. 557 embodies questions of public policy at all; it is simply an enactment which gives the salved ship an advantage when the salvage services have been rendered by one of His Majesty's ships which the owners of the salved property would not get if those services had been rendered by other persons. That is an advantage which anybody may resign by contract, and it seems to me quite clear that in the present case the parties have contracted that that advantage should not accrue to the owners of the *Valverda.*

That being my view, I think it is unnecessary to go into any further consideration of the authorities beyond saying this, that in the cases which have been cited by Mr. Carpmael as specimens of many other cases of a similar type which he might have cited, but which he kindly spared me, the Courts have used expressions such as those which were used by other members of the Court of Appeal in the case of *The Sarpen* as, for example, where Swinfen Eady L.J. said: (1) "Where salvage services are rendered by a King's ship, no claim to salvage can be made in respect of the ship," and he quotes s. 557. The point which is now before me was not before that Court, and it seems to me that I should be quite wrong in holding myself bound by such expressions as those, which are really obiter, and were pronounced in cases where attention was not directed to the language of s. 557, and to hold that they really are binding decisions as to the proper meaning of that section.

The only matter which has given me even a little difficulty in this case has been the fact that in s. 557 the language used would seem to indicate a direction to the tribunal which is trying the case of salvage to disallow claims under particular heads, but consideration of the matter has satisfied me that it would be wrong to regard those words as imposing a duty on the tribunal in favour of one party, which that party could not waive by agreement, and I am supported in the view that it would not be right to take that as the proper meaning and intention of the section by the consideration that in other sections where similar language is used it is, and always has been, construed as giving a right to the one party to the litigation which that party to the litigation may waive by agreement or otherwise if he chooses. It is not necessary to go through all the various statutes to which this observation would apply. I think it is sufficient to refer to the Public Authorities Protection Act, 1893. Under s. 1 of that Act it is enacted: "Where after the commencement of this Act" certain actions against certain bodies are commenced, "the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months." Those are words just as positive on the face of them as any used in s. 557, and yet in that statute and in the Statute of Limitations, and a number of other statutes, exactly similar language has been construed as giving a right which the one party may insist upon if he likes, but which he may equally waive if he likes. A very apposite case is the case of *Griffiths* v. *Earl of Dudley*. (1) The point there was that because s. 1 of the Employers Liability Act, 1880 (43 & 44 Vict. c. 42), enacted that where personal injury is caused to a workman in certain specified cases he or his legal representative "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work," that was a positive enactment that he should have certain remedies. The case arose because the workman in question had contracted to contribute to a fund which existed in the works and agreed that his employer should not be liable under the Employers Liability Act, 1880. It was suggested there that the workman could not contract out of the positive enactment contained in s. 1 of the Act, and the Court held that the section conferred a right which he could, upon an agreement entered into for good consideration, waive. In giving his decision in that case, Cave J. used the

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(1) [1916] P. 312.

(1) 9 Q. B. D. 357.

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following language (1): "The main question is whether or not a workman can contract himself or his representatives out of the benefits of the Employers Liability Act. The plaintiff's husband did so contract himself; it is said that the contract was against public policy. No authority has been cited in support of that proposition, and I can see no reason why such a contract should be against public policy. I should not hold it to be so, and thus interfere with freedom of contract, unless the case were clearly brought within the principle of the decisions as to the contracts which are against public policy." Every word of that applies in the present case. The suggestion that it would be against public policy to make such a contract is a mere suggestion based upon no authority, nor, so far as I can see, any reason. I cannot see why, if a person likes to contract that the Admiralty should use a warship to salvage his vessel and be paid reasonable salvage for doing so, there is anything in the public interest which would prevent his so contracting.

The result is that, in my opinion, the learned arbitrator was correct in the view which he took, and, consequently, I answer the question put in the affirmative, and, therefore, the award which he has made will stand.

Solicitors for owners: *William A. Crump & Son.*
Solicitor for Admiralty: *Treasury Solicitor.*

W. L. L. B.

(1) 9 Q. B. D. 364.

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